Supreme Court, U.S.
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In The

Supreme Court of the United States

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MARSHALL COLEMAN, *et al.*,

Petitioners,

vs.

PREUSSAG AKTIENGESELLSCHAFT,

Respondent.

◆

On Petition For Writ Of Certiorari
To The Texas Supreme Court

◆

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sup. Ct. R. 14.1 (a)

Petitioners are Gulf War Veterans saddled with documented physical and emotional injuries arising from exposure to biological and chemical agents during the Iraqi-Kuwaiti war. Respondent is a multinational conglomerate who acted as an enabler to the tyranny of Saddam Hussein's Iraq by assisting in the manufacture of the infrastructure necessary for the creation of the diabolical biological and chemical Iraqi war machine. Petitioners have attempted to bring the enabler to justice through the only means available – and perhaps the only one that matters most to the multinational conglomerate – the financial bottom line. Unfortunately, due to the Texas courts' adherence to a legalistic and archaic formulation of personal jurisdiction analysis (*i.e., alter ego*), the corporation to date has avoided addressing its liability to the veterans for their foreseeable injuries arising from its wilful and shameful pact with Iraq.

Petitioners ask the Court to review the following Questions Presented:

> 1. Whether a nonresident multinational corporation's regular transaction of business with several related Texas corporations – without a preliminary showing of *alter ego* – may be considered as proof that the nonresident company has established minimum contacts with Texas such that the exercise of personal jurisdiction over the nonresident company comports with the due process clause of the Fourteenth Amendment to the U.S. Constitution.

QUESTIONS PRESENTED - Continued

2. Whether a nonresident multinational corporation's continuous provision of services (including lending of money, currency exchange, accounting, factoring of cash flow, investment management, and guaranteeing of loans) for several Texas corporations, may be proof that the nonresident company has established minimum contacts with Texas through those related companies such that a Texas court's imposition of personal jurisdiction over the nonresident company comports with the due process clause of the Fourteenth Amendment to the U.S. Constitution, without a preliminary showing of *alter ego*.

PARTIES TO THE PROCEEDING

Sup. Ct. R. 14.1 (b)

Petitioner Marshall Coleman is the lead plaintiff of a group of over 1,800 named Plaintiffs and Intervenors-Plaintiffs who served in the military on behalf of the American people in the Iraqi-Kuwaiti war. Their participation in the Persian Gulf War caused them to be exposed by the forces of Iraq to chemical and biological weapons. Petitioners have provided the Court with a complete list of the named Petitioners at Appendix F. Petitioners have made class allegations under Texas Rule of Civil Procedure 42, and estimate that the total number of potential class members is between 50,000 and 100,000 men and women of the U.S. armed services.

Respondent Preussag Aktiengesellshaft ("Preussag AG") is a company organized under German law and headquartered in Hanover, Germany. Preussag is known to have aided Saddam Hussein's Iraq in the procurement, design and construction of the materials necessary to construct a facility for the development of biological and chemical weapons.

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PETITION FOR WRIT OF CERTIORARI

Marshall Coleman, *et al.*, respectfully petition for a writ of certiorari to review the decision of the Supreme Court of Texas.

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OPINIONS BELOW
Sup. Ct. R. 14(d)

1. The 23rd District Court of Brazoria County, Texas, denied Respondent Preussag AG's Special Appearance in an unpublished order dated December 15, 1998. Appendix D.
2. ***Preussag Aktiengesellschaft v. Coleman*, 16 S.W.3d 110 (Tex. App. – Houston [1st Dist.] 2000, pet dism'd w.o.j.)**. Appendix C. The Texas First Court of Appeals reversed the state trial court's decision.
3. The Texas Supreme Court dismissed Petitioners' petition for review in an unpublished letter dated November 15, 2001. Appendix A. The Court denied Petitioners' motion for rehearing on January 10, 2002. Appendix B.

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JURISDICTION
Sup. Ct. R. 14.1(e)

This Court has jurisdiction over this Petition because a state court of last resort has determined an important question of federal Constitutional law – *i.e.*, the interpretation of the minimum contacts doctrine announced in *International Shoe v. Washington*[1] – in a constrictive manner so as to conflict with other decisions, not simply within the Texas court system, but in the federal circuit courts as well.[2] The unsettled dispute between differing interpretations of the minimum contacts doctrine as it pertains to nonresident corporations has not been, but should be, settled by this Court.[3]

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[1] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The conflict in approach is not simply academic. There presently are two cases from Texas before this Court in which that state's appellate courts have differed in assessing a German parent company's dealings with Texas affiliates. On one hand, Texas's First Court of Appeals held that a German company's contacts with Texas companies **could not** be attributed to the German absent a finding of *alter ego*. On the other hand, Texas's Third Court of Appeals held that a German parent company and its local subsidiary could be considered a "functional whole" for jurisdictional purposes without showing *alter ego*.[4] The Texas Supreme Court has declined review in both cases, leaving the dispute unsettled. Both cases are now before this Court through Petitions for Writ of Certiorari.[5]

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[2] *Compare Preussag AG v. Coleman*, 16 S.W.3d 110 (Tex. App. – Houston [1st Dist.], pet. dism'd), Appendix C, with *Daimler-Benz AG v. Olson*, 21 S.W.3d 707 (Tex. App. – Austin 2000, pet dism'd w.o.j.), *pet. struck*, 53 S.W.3d 308 (Tex. 2000), *cert. filed*, 70 U.S.L.W. 3430 (Dec. 19, 2001) (No. 01-929). Appendix E. *See also Finance Co. of America v. BankAmerica Corp.*, 493 F. Supp. 895, 905-906 (D. Md. 1980) (noting that the Fourth Circuit Court of Appeals has "abandoned, *sub silentio*, the formalistic inquiry required by *Cannon in favor of a minimum contacts analysis"), citing Lee v. Walworth Valve*, 482 F.2d 297, 301 (4th Cir. 1973) (court refused to ignore activities of local subsidiaries when considering personal jurisdiction over nonresident corporation because the activity in the forum state appeared to have been joint in nature), *and Velandra v. Regie Nationale des Usines Renault*, 336 F.2d 292, 296 (6th Cir. 1964).

[3] Sup. Ct. R. 10(b), (c).

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CONSTITUTIONAL AMENDMENT INVOLVED
Sup. Ct. R. 14.1(f)

1. U.S. Constitution, amend. 14, section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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STATEMENT OF THE CASE
Sup. Ct. R. 14.1(g)

I. Nature of the Case

Petitioners consist of the men and women of the Armed Forces of the United States who, during their military service in Iraq and Kuwait during the 1990 Gulf

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[4] *Compare Preussag*, 16 S.W.3d 110, Appendix C, *with Daimler-Benz*, 21 S.W.3d 707. Appendix E.

[5] *DaimlerChrysler Aktiengesellschaft v. Olson*, *petition for cert. filed*, 70 U.S.L.W. 3430 (Dec. 19, 2001) (No. 01-929).

War were subjected to biological and chemical weapons. They have suffered severe and disabling injuries as a result of their exposure. Through considerable pretrial discovery, Petitioners have assembled convincing evidence that numerous multinational companies such as Respondent assisted Iraq in the creation and construction of the elements necessary for Iraq to develop chemical and biological weaponry. These multinational corporations placed profit before the safety of nations, endangered the lives of our military personnel, and ultimately may have allowed similar attacks on our civilians here in our homeland.

As a result of their foreseeable injuries arising from the negligent and intentional conduct of companies such as Respondent, Petitioners brought suit against these companies for their negligence and intentional misconduct in dealing with Iraq. Petitioners, the Gulf War veterans, present the Court with the issue of a court's Constitutional ability to exercise general personal jurisdiction over one of the foreign entities whose business includes overseeing and managing companies located in the forum state of Texas. The nonresident company (Respondent) and the relevant eleven Texas-based companies are ***not** alter egos*, but separately incorporated entities.

The state appeals court overruled the trial court and concluded that Respondent lacked minimum contacts with Texas because many of Respondent's contacts with Texas stemmed from its routine business with the eleven *related* Texas-based companies. According to the appeals court, these contacts were legally irrelevant, despite their being continuous and systematic, because Respondent was separately incorporated and the corporate veil had not been breached by proving *alter ego*. Hence, the clear, continuous and systematic business contacts with Texas of the Texas-based companies could not be attributed to Respondent despite the dictates of *International Shoe*.[6] The propriety of excluding such contacts has not been directly addressed by this Court in the 55 years since *International Shoe,* and is based on a formalistic reading of archaic authority espoused by this Court in *Cannon Manufacturing Co. v. Cudahy Packing Co.*[7] Petitioners respectfully submit that piercing the corporate veil through an *alter ego* analysis is inappropriate considering the current international realities of corporate business. Moreover, requiring such a finding despite clear, continuous and systematic business contacts with a forum state by a nonresident defendant violates the minimum contacts analysis formulated by this Court.

II. Procedural Background

The named Petitioners[8] are approximately 1800 American veterans of the 1991 Persian Gulf War who were exposed to harmful biological and chemical materials while serving in Iraq and Kuwait. Petitioners have also made class allegations under Texas Rule of Civil Procedure 42, and estimate that the total number of potential additional members is between 50,000 and 100,000. The named Petitioners reside in most all of the States and Territories of the United States.[9]

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[6] *Preussag,* 116 S.W.3d 110, 125.

[7] 267 U.S. 333 (1925).

[8] See Appendix F for a list of the names of the approximately 1800 named Petitioners.

Respondent Preussag Aktiengesellschaft is a German corporation headquartered in Hanover, Germany, whose business consists of managing its investments in both direct and indirect subsidiary companies located throughout the world. Eleven of these companies are located in Texas. Respondent's corporate formalities are such that Respondent is not an *alter ego* of these eleven companies; rather, all the Texas companies appear to be separately incorporated.[10]

Respondent challenged the state trial court's jurisdiction by filing a special appearance.[11] Following considerable jurisdictional discovery and an evidentiary hearing, the 23rd District Court denied Respondent's special appearance on November 15, 1998.[12] Respondent moved for interlocutory appeal of the jurisdictional decision in accordance with Texas law.[13] On appeal, the Court of Appeals for the First District of Texas reversed, finding that because Respondent's contacts with the eleven Texas-related companies were not legally significant and, therefore, Respondent lacked sufficient minimum contacts to allow the invocation of personal jurisdiction.[14]

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[9] *See Preussag*, 16 S.W.3d at 113 (of nearly 1800 plaintiffs in this case, only approximately 185 are Texas residents).

[10] *Preussag*, 16 S.W.3d at 118.

[11] TEX. CIV. PRAC. & REM. CODE §§17.042, 51.014 (Vernon 1996 & Supp.2001); TEX. R. CIV. P. 120a; *see Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991).

[12] Appendix D.

[13] TEX. CIV. PRAC & REM. CODE §51.014 (Vernon Supp. 2001).

Petitioners sought review in the Supreme Court of Texas on grounds that two opinions from Texas's intermediate courts conflicted.[15] The Court of Appeals for the Third District of Texas in Austin (in an entirely separate case) held that another German company could be subject to Texas jurisdiction based on the company's regular business with its Texas subsidiary, because the German company and its Texas subsidiary formed a "functional whole" for conducting business in Texas.[16] The Court of Appeals for the Third District considered the Texas components of the German company even though the companies were not *alter egos*. The First Court of Appeals' opinion conflicted with that of the Third Court of Appeals, yet notwithstanding this conflict, the Texas Supreme Court dismissed the petition for review without judgment on November 15, 2001.[17] The Texas Supreme Court denied Petitioners' motion for rehearing on January 10, 2002.[18] This Petition followed.

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[14] *Preussag*, 16 S.W.3d at 126. Appendix C.

[15] Tex. Civ. Prac. & Rem. Code §51.014(a)(7) (Vernon Supp. 2001).

[16] *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707 (Tex. App. - Austin 2000, pet. dism'd w.o.j.), *petition struck*, 53 S.W.3d 308 (Tex. 2000), *cert. filed*, 70 U.S.L.W. 3430. Appendix E.

[17] Appendix A.

[18] Appendix B.

III. Facts

The published opinion of the Court of Appeals for the First District of Texas[19] adequately recites the pertinent jurisdictional facts. Petitioners' chief complaint lies in the appellate court's application of the law, and in the Texas Supreme Court's refusal to correct it given the inconsistent applications by Texas intermediate courts.

Respondent Preussag is in the business of investing in and providing financial services for over 500 subsidiaries.[20] While some companies manufacture goods and others sell services, Preussag earns profit through investing in and managing others' businesses. Preussag invests in and manages at least eleven companies that do business in Texas. Specifically, it:

(1) deposits money into Texas bank accounts for its Texas affiliates;

(2) extends lines of credit to its Texas affiliates at favorable rates in order to underwrite their Texas operations;

(3) obtains liability insurance for its Texas affiliates;

(4) hires and pays Houston lawyers on behalf of its affiliates;

(5) insists that its Texas affiliates follow its financial procedures and accounting methods; and

(6) handles foreign currency transactions for its Texas affiliates.

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[19] 16 S.W.3d at 114-118, Appendix C.

[20] 16 S.W.3d at 114, Appendix C.

Moreover, Preussag's Texas activities extend beyond providing banking and financial services for eleven affiliates; it also directly monitors its Texas investments by:

> (1) sending auditors to Texas to monitor the business and ensure its standards are maintained;
>
> (2) hiring Houston lawyers (the law firm of Vinson & Elkins) to defend it; and
>
> (3) signing contracts agreeing to be bound by Texas law.[21]

Because Preussag conducts its business by investing in and managing other entities, it is not unreasonable or unfair to determine that Preussag is indeed "present" in Texas for jurisdictional purposes. If one accepts Preussag's rationale that the stated contacts are to be discounted, there appears to be *no* forum anywhere – apart from Hanover, Germany – where this multinational company could ever be sued under a theory of general jurisdiction. A multinational investment company should not be allowed to use the corporate form to achieve immunity from suit in jurisdictions where it is transacting business on a continuous and systematic basis.

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REASONS FOR GRANTING THE PETITION

This Court should review the disparate approaches used by trial courts and adhered to in the appellate courts in deciding whether to exercise personal jurisdiction over foreign parent corporations based on regular, systematic and continuous business contacts with and through in-forum companies.[22]

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[21] 16 S.W.3d at 125-26.

The restrictive approach used by the appellate court below – *i.e.*, a plaintiff must first prove the foreign company is an *alter ego* of the local companies before any contact with the local companies is considered – is overly restrictive and unrealistic because it ignores modern investment capitalism. Companies such as Respondent are involved in ***investing*** – as well as manufacturing – and proving *alter ego* is irrelevant. Companies such as Respondent were designed to conduct business precisely by investing in, and providing services to, local companies. It is thus highly unlikely that Respondent would abuse or disregard corporate formalities. Nevertheless, the fact remains that the nonresident corporation is indeed purposefully and intentionally conducting business in the forum state.

Texas courts and many Circuits adhere to the concept that if a company is related to a resident company, the contacts with that company may not be considered absent a finding of *alter ego*, which is an arduous task.[23] On the other hand, at least two Circuit Courts have either eliminated or significantly diminished the validity of the *alter ego* analysis in the personal jurisdiction context.[24]

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[22] *See Gruca v. Alpha Therapeutic Corp.*, 19 F. Supp. 2d 862, 865 (N.D. Ill. 1998) ("Courts have not developed a bright-line test for determining when it is appropriate to exercise jurisdiction over a parent corporation based upon the activities of its subsidiary.")

[23] In *Hargrave v. Fibreboard Corporation*, 710 F.2d 1154 (5th Cir. 1983), the Fifth Circuit listed the *alter ego* factors as (1) amount of stock owned by the parent of the subsidiary; (2) did the two corporations have separate headquarters; (3) did they have common officers and directors; (4) did they observe corporate formalities; (5) did they maintain separate accounting

As reflected in the state appellate court's opinion (and in certain opinions cited herein), lower courts apply the restrictive approach due to a belief that this Court's 1925 opinion in *Cannon*[25] so requires. As shown in this Petition, there is (1) doubt as to whether *Cannon* ever announced such a rule, and if so, (2) whether the "rule" should be followed. Any requirement that a plaintiff must first prove a full-blown case of *alter ego before* a nonresident investment company's routine business contacts with local companies are factored into the jurisdictional consideration is out-of-step with modern global investment. Several courts have already recognized that the continuous and systematic contacts of an overseas investment company with its separately incorporated United States affiliates should at least be considered when deciding whether the overseas company is amenable to jurisdiction.[26]

Absent guidance, lower courts have differed in addressing this key jurisdictional issue. For example, in a

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systems; (6) did the parent exercise complete authority over general policy; (7) did the subsidiary exercise complete authority over daily operations. *Id.* at 1160.

[24] *Lee v. Walworth Valve,* 482 F.2d 297 (4th Cir. 1973); *Velandra v. Regie Nationale des Usines Renault,* 336 F.2d 292, 296 (6th Cir. 1964).

[25] 267 U.S. 333 (1925).

[26] *See, e.g., Brunswick Corp. v. Suzuki Motor Co., Ltd.,* 575 F. Supp. 1412, 1415 (E.D. Wis. 1983); *Daimler-Benz,* 21 S.W.3d 707, 723.

separate case now before this Court, Texas's Third Court of Appeals determined that a German company (Daimler Benz) formed a "functional whole" with its Texas subsidiary for selling cars. Hence, Daimler-Benz was subject to Texas jurisdiction even though it was ***not*** an *alter ego* of its Texas-based subsidiary.[27] In contrast, the lower court in this case did not apply a "fundamental whole" approach to Respondent's similar business arrangements. Texas jurisprudence is thus in disarray concerning the interpretation of minimum contacts for foreign companies who conduct business in Texas through Texas companies. This Court has in fact questioned, through its decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[28] whether the *Cannon* doctrine yet retains validity and should now resolve the disparity.[29]

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[27] *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707 (Tex. App. – Austin 2000, pet. dism'd w.o.j.), *petition struck*, 53 S.W.3d 308 (Tex. 2000), *cert. filed*, 70 U.S.L.W. 3430 (Dec. 19, 2001) (No. 01-929).

[28] "In the only cases in which it has considered the question, this Court held that the activities of a subsidiary are not necessarily enough to render a parent subject to a court's jurisdiction. . . . " *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988). The implication is clearly that they could.

[29] Texas interprets its Long Arm Statute, TEX. CIV. PRAC. & REM. CODE §17.045, as "far as the federal constitutional requirements of due process will allow. . . . " *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). Therefore, the jurisdictional inquiry under the Texas long-arm statute collapses into a single due process inquiry. *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 418 (5th Cir. 1993).

Indeed, the national and international implications of this case are enormous. In its present posture, the Texas courts will have effectively extinguished any right of recovery for the Gulf War veterans from this rogue company due to the constraints of the archaic formulation of *alter ego* that has not been embraced by this Court for over 75 years. The time is now: never before has international culpability for supporting terrorist regimes been more pronounced, and never before has abuse of corporate structure been more exposed to the public.[30] This case contains both – as well as 1,800 American veterans and their families as named Plaintiffs and potentially a class of 100,000 who have suffered because of the foreseeable acts of the nonresident corporation.

It is imperative that the Court define the parameters of the states' enforcement of the United States Constitution and do so within the reality of the geo-political world that, unfortunately, we are faced with following the Gulf War and the terrorist attacks of September 11, 2001. This Court must join the fight to protect the citizens of the United States and mandate the change of the state courts' jurisdictional reach so that these corporate merchants of death do not escape justice because of 19th-century legalistic views of personal jurisdiction and corporate separateness as heretofore expressed by some Texas courts and affirmed by the Texas Supreme Court.

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[30] The recent public debacle of Enron Corporation illustrates the damage that multinational corporations can wreak by misusing the corporate form when such actions are allowed to go unfettered.

ARGUMENT SUPPORTING REASONS FOR REVIEW

This Court should grant petition for writ of certiorari for the following reasons:

Reason 1

This Court should use this opportunity to consider a rule by which a nonresident company's investment in, and management of, local companies – without any showing of *alter ego* – may be considered as sufficient evidence of minimum contacts when determining personal jurisdiction.

As recognized by several lower courts, minimum contacts analysis under *International Shoe* allows a court to consider a nonresident company's regular business contacts with forum entities in determining personal jurisdiction, without showing an *alter ego* relationship or abuse of the corporate form.

For example, in *Brunswick Corp. v. Suzuki Motor Co., Ltd.*,[31] the court exercised jurisdiction over a Japanese parent corporation (Suzuki) based on Suzuki's regular business contacts with subsidiaries located in Wisconsin. The case involved a Wisconsin company's patent infringement action against a Japanese maker of outboard motors (Suzuki Motor Co.) and the Japanese company's Wisconsin dealer of its products. Suzuki challenged the federal district court's jurisdiction over it, arguing that any Wisconsin contacts it had were through its local dealer. In finding personal jurisdiction over the Japanese company, the *Brunswick* court never found an *alter ego* relationship. Rather, it considered whether Suzuki Motor Co. had sufficient regular business contact with its Wisconsin dealer to warrant the invocation of personal jurisdiction over the Japanese concern.[32] This flexible approach comports with the concerns of fundamental fairness outlined in *International Shoe* and its progeny, while heeding the reality of companies that make profits solely through global investment.

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[31] 575 F. Supp. 1412, 1415 (E.D. Wis. 1983).

Courts rejecting the *Brunswick* approach often cite this Court's opinion in *Cannon*,[33] a 1925 case involving the propriety of service of process on an in-state subsidiary of the absent defendant. In *Cannon*, this Court considered whether a subsidiary's activities within North Carolina were sufficient to establish that the parent corporation was doing business in that state. This Court framed the issue as "whether the corporate separation carefully maintained must be ignored in determining the existence of jurisdiction."[34] In holding that the parent was **not** subject to jurisdiction in North Carolina, this Court used a pure *alter ego* analysis: "[t]he corporate separation, though perhaps merely formal, was real. It was not pure fiction."[35] This Court added, "No question of the constitutional powers of the state, or of the federal government, is directly presented."[36]

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[32] 575 F. Supp. at 1415.

[33] 267 U.S. 333 (1925).

[34] 267 U.S. at 336.

[35] 267 U.S. at 337.

[36] 267 U.S. at 336.

Since *Cannon*, however, this Court has dramatically revised the Constitutional standards for exercising personal jurisdiction. Most importantly, the physical presence test that was employed during *Cannon's* era (1925) has been replaced by the more sophisticated minimum contacts doctrine confirmed in *International Shoe*.[37] Any continued legitimacy of *Cannon* in personal jurisdictional matters was drained by the advent of the minimum contacts doctrine some 20 years later. Unfortunately, many courts yet invoke *Cannon* (or cases that rely on it) to decide jurisdictional issues, with dubious results.[38]

This Court should confirm that Cannon does not announce a rule that requires a court to find an *alter ego* relationship before a nonresident's contacts with local contacts may be factored into the minimum contacts analysis. Recent opinions reflect that district courts have, on occasion, rejected *Cannon's* supposed requirement of proving *alter ego* as a condition precedent, and instead recognize a more realistic assessment of corporate structure.

In *Telectronics Pacing Systems, Inc.*,[39] a series of products liability claims were brought against the Delaware manufacturer of a heart pacemaker, its parent corporation, and the ultimate parent corporations, which were Australian. The various companies were separately incorporated. The Australian parent companies moved to dismiss based on the federal court's lack of personal jurisdiction.[40] As the *Telectronics* court noted:

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[37] 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

[38] 16 S.W.3d at 122-123 n. 14.

[39] 953 F. Supp. 909, 913-921 (S.D. Ohio 1997).

> The Australian defendants insist that in order for this Court to exercise jurisdiction over them, Plaintiffs must demonstrate that the Australian Defendants are alter egos (or pierce the corporate veil) of the Telectronics Companies. The Australian Defendants further contend that Plaintiffs have failed to provide sufficient facts to justify piercing the corporate veil. . . . [41]
>
> The formalistic approach of the alter ego doctrine, however, is irrelevant to the question whether the exercise of jurisdiction over an absent parent corporation would violate the Due Process Clause.
>
> Concededly **a corporation's relationship with an affiliated corporation in the forum is relevant to the due process question in a manner different from that in which it pertains to the corporate law question of alter ego relationships and "veil piercing."** For alter ego purposes the nature of the relationship – the identity between the corporations alone is controlling. **For jurisdictional purposes, the fact of the existence of the relationship . . . is a minimum "contact, tie or relation" with the forum that may render possible the constitutional exercise of jurisdiction if the relevant factors, including both convenience and the orderly administration of the laws, balance in that direction.** The mere existence of the relationship

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[40] *Id.* at 910-11.

[41] 953 F. Supp. at 914-15.

> is one relevant factor. The nature of the relationship the degree of control or identity bears upon the weight to be given that one factor, but it does not foreclose reliance on this factor as a legitimate consideration in the due process analysis.[42]

The *Telectronics* court then squarely addressed *Cannon*:

> Many courts, however, continue to conflate the requirements of due process and the alter ego doctrine. Much of the confusion stems from questions regarding the continuing vitality of the [U.S.] Supreme Court's opinion in *Cannon v. Cudahy Packing Co.*, which have addressed the issue whether a subsidiary's contacts with the forum can be imputed to the parent corporation.[43]

The *Telectronics* court reviewed *Cannon's* facts, noting that many courts apply the 1925 case "without considering whether *Cannon's* analysis is still valid." *Id.* The *Telectronics* court concluded:

> We find persuasive the view that *International Shoe* has supplanted *Cannon* in the context of personal jurisdiction. *Cannon's* presumption of form over substance is out-of-step with the modern approach to personal jurisdiction which is based upon fairness and reasonableness. Accordingly, we conclude that the formalistic alter ego principles of *Cannon* are no longer

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[42] 953 F. Supp. at 915, *citing Energy Reserves*, 460 F. Supp. at 507.

[43] 953 F. Supp. at 916 (citations omitted).

> applicable in the analysis of whether the exercise of personal jurisdiction over a foreign corporation is constitutional. Instead, the proper exercise of jurisdiction depends on a "sufficient connection between the defendant and the forum as to make it fair to require defense of the action in the forum."[44]

Similarly, in *Meredith v. Health Care Products, Inc.*,[45] a personal-injury action was brought against a corporation that sold a dietary supplement called Cal-Ban 300. The defendant sought to dismiss the case for lack of personal jurisdiction.[46] The *Meredith* court reviewed a trilogy of Kansas opinions where nonresident corporations were held subject to local jurisdiction based on their subsidiaries' contacts.[47] After reviewing the three cases, the *Meredith* court concluded that it possessed personal jurisdiction over the nonresident parent based on its subsidiaries' activities, without piercing the corporate veil or finding *alter ego*.[48]

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[44] 953 F. Supp. at 918, citing *Energy Reserves*, 460 F. Supp. at 502, *quoting Kulko v. Superior Court*, 460 U.S. 84, 91 (1978).

[45] 777 F. Supp. 923 (D. Wyo. 1991).

[46] 777 F. Supp. at 925.

[47] *Energy Reserves*, 460 F. Supp. at 490 (D. Kan. 1978); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764 (D. Kan. 1981), *and Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463, 1470-71 (D. Kan. 1983) ("The *alter ego* and minimum contacts tests bear little relation to each other. Although the factors which indicate those circumstances under which a subsidiary corporation and its parent or owner may be treated as one for purposes of liability are significant in gleaning from the record whether the formal corporate separation has been maintained, these factors have little relation to those which bear upon the due process fairness question of requiring a defendant to answer in the forum").

In *Allen Organ Co. v. Kawai Musical Instruments Manufacturing Co.*,[49] a Japanese corporation moved to dismiss a patent-infringement action filed against it in federal court. As the district court noted:

> Kawai Japan [defendant] contends that this court has no personal jurisdiction over it since it has no direct contacts with the Commonwealth of Pennsylvania. Moreover, it argues that the Court cannot impute to it any indirect contacts with this forum based upon the activities of Kawai America because the latter is not and cannot be shown to be its alter ego. The defendant places primary reliance on the case of *Cannon Manufacturing Company v. Cudahy*. . . . [50]

After discussing the facts of *Cannon*, the district court continued:

> The *Cannon* opinion was written some twenty years prior to the *International Shoe* opinion at a time when extraterritorial service of process "was statutorily unauthorized and constitutionally restricted by the old territorial due process notion that a state might exercise jurisdiction over only those persons present in the forum." *Brunswick Corporation v. Suzuki Motor Company*, 575 F.Supp. 1412, 1418 (E.D. Wis. 1983). . . .

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[48] 777 F. Supp. at 926.

[49] 593 F. Supp. 107 (D. Penn. 1984).

[50] 593 F. Supp. at 109-110.

> *International Shoe* rejected the "presence" doctrine and substituted the due process standard of personal jurisdiction previously discussed [i.e., minimum contacts]. The result of the change in standard is to render irrelevant to our determination of personal jurisdiction any consideration of the alter ego principles of corporate law discussed in *Cannon*. Under *International Shoe,* a corporate defendant's indirect contacts through the activity of a third party may be sufficient, in appropriate circumstances, to require it to defend in the forum, whether or not the third party is related to the defendant, let alone whether it is its alter ego.[51]

Several other district courts have agreed with the *Allen Organ* court that *Cannon* is no longer applicable to personal jurisdiction decisions.[52]

This Court should confirm that the fact-specific and flexible approach to minimum contacts as employed in the cases cited above is consistent with – indeed, required by – the teachings of *International Shoe* and its progeny. Such an approach should be available in cases involving well-structured international companies whose business consists of managing and controlling sizeable investments in separate companies located within the forum. Such an approach recognizes the realities of modern business, which is often investment oriented, and spread over numerous nationalities. The routine business dealings of a nonresident company with Texas entities should be factored into the equation by which the nonresident's amenability to suit in Texas is measured. This should be true without regard to whether the affiliates with which it transacts business are technically separate entities.

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[51] 593 F. Supp. at 110.

[52] *See Finance Co. of America v. BankAmerica Corp.*, 493 F. Supp. 895, 905-906 (D. Md. 1980) (noting that the Fourth Circuit Court of Appeals has "abandoned, *sub silentio,* the formalistic inquiry required by *Cannon in favor of a minimum contacts analysis"), citing Lee v. Walworth Valve,* 482 F.2d 297, 301 (4th Cir. 1973). *See additionally Coca-Cola Co. v. Proctor & Gamble Co.*, 595 F. Supp. 304, 307-308 (N.D. Ga. 1983); *Roorda v. Volkswagenwerk, AG,* 481 F. Supp. 868, 877-79 (D.S.C. 1979); *W. Clay Jackson Enterprises v. Greyhound Leasing & Fin. Corp.*, 431 F. Supp. 1229, 1232 n. 1 (D. P.R. 1977); and *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 849 (S.D. Fla. 1975).

This Court should grant the petition for writ of certiorari.

Reason 2

A recent Texas appeals decision – which is also now before this Court on petition for writ of certiorari[53] – reflects the disparate approaches used by courts faced with this issue in the absence of this Court's guidance. While the case at bar was being decided below, the Texas Third Court of Appeals was asked to consider the relationship between a German car company (Daimler-Benz) and its Texas distributor (MBNA) in a personal jurisdiction context.[54] The two companies were separate, and as here, the plaintiffs did *not* prove an *alter ego* relationship.

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[53] *DaimlerChrysler Aktiengesellschaft v. Olson, petition for cert. filed,* 70 U.S.L.W. 3430 (Dec. 19, 2001) (No. 01-929).

[54] *Daimler-Benz Aktiengesellschaft v. Olson,* 21 S.W.3d 707 (Tex. App. – Austin, 2000, pet. dism'd w.o.j.), *petition struck,* 53 S.W.3d 308 (Tex. 2000).

While the Third Court of Appeals agreed that the two entities were formally and legally separate, it nonetheless found that they "form[ed] a functional whole" in selling cars in Texas, so as to subject Daimler-Benz to jurisdiction. In short, the Texas Third Court of Appeals simply applied the *International Shoe* formula in analyzing Daimler-Benz's Texas contacts.

In *Daimler-Benz,* the Texas Third Court of Appeals was presented with a similar relationship between entities: *i.e.*, a German company that regularly conducts business with an entity that unquestionably does business in Texas, as well as with other companies around the globe:

> Daimler-Benz is a German corporation with its principal place of business in Suttgart, Germany. As shown in its annual reports, Daimler-Benz is a holding company with four corporate units: Mercedes-Benz, Daimler-Benz Industrie, Daimler-Benz Aerospace, and Daimler-Benz InterServices. These units, which comprehend all subsidiary corporations of Daimler-Benz, form the Daimler-Benz Group. The Mercedes-Benz corporate unit accounts for a preponderant share of Daimler-Benz's profit; in 1994, the Daimler-Benz Group earned profits of 0.9 billion deutsche marks, while the Mercedes-Benz unit returned 1.8 billion deutsche marks, its earnings being offset by losses in other corporate units.[55]

The company with which Daimler-Benz dealt was unquestionably engaged in business in Texas; indeed, its Texas contacts were far less direct than those in this case:

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[55] 21 S.W.3d at 713.

> Mercedes-Benz of North America, Inc. (MBNA) is the sole importer and distributor in the United States of Mercedes-Benz cars and parts. MNNA, a Delaware corporation, with its principal place of business in Montvale, New Jersey, is a direct, wholly owned subsidiary of Daimler-Benz North America Corporation (DBNAC). DBNAC, also a Delaware corporation, with its principal place of business in New York City, is a direct, wholly owned subsidiary of Daimler-Benz.[56]

In contrast, Preussag regularly dealt with five companies that are Texas companies that are also headquartered in Texas. The cases are also similar in that there was no possibility of considering the companies to be *alter egos*:

> Daimler-Benz submitted evidence that it and MBNA have separate officers and directors and that the two corporations have always formally maintained their separate corporate existences. Daimler-Benz has always kept its books, records, tax returns, and financial statements separate from those of MBNA. All real and personal property that MBNA uses or controls has been owned by it or leased by it from parties other than Daimler-Benz.[57]

As in this case, the facts in *Olson* establish that the nonresident was regularly conducting business with a company that was not only located in Texas, but was involved in its Texas business:

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[56] 21 S.W.3d at 713-714.

[57] 21 S.W.3d at 721.

> Undisputed evidence in the record shows that MBNA does business in Texas. The parties stipulated that MBNA is qualified to do business in Texas. As mentioned above, the parties stipulated that MBNA advertises U.S.-version Mercedes-Benz cars for sale in Texas; MBNA's advertising appears in publications and newspapers directed to Texas and is broadcast over televison and radio stations throughout Texas. The evidence shows that MBNA, as the exclusive U.S. distributor of Mercedes-Benz cars, selects its Mercedes-Benz dealers and forms contractual relationships with them. MBNA also supervises the performance of the dealers, has authority to terminate dealers, and handles the detailed accounting and record-keeping associated with the dealers.[58]

The Third Court of Appeals then considered the nature of the nonresident's business with the local company, and found it to be regular, continuous and systematic in nature:

> In the section of Daimler-Benz's 1992 through 1994 annual shareholder reports titled, "The Corporate Principles of Daimler-Benz," Daimler-Benz described itself as an international company and wrote, "Daimler-Benz does business in all corners of the globe." In a speech given in October 1997, the chairman and chief executive officer of MBNA described MBNA as "the organization that links our parent company in Germany and our 320 dealers across the United States." . . . [59]

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[58] 21 S.W.3d at 721.

[59] 21 S.W.3d at 722.

The court considered evidence of regular business between Daimler-Benz and MBNA which is similar to the evidence presented here:

> Although Daimler-Benz and MBNA do not appear to be managed by the same individuals, Daimler-Benz describes itself as the "managing holding company" of the Daimler-Benz Group, and one member of Daimler-Benz's Board of Management is shown in the 1994 shareholder report as being responsible for Daimler-Benz's subsidiaries. The companies within the Daimler-Benz Group contribute remuneration each year to the members of Daimler-Benz's Board of Management. Among its principal subsidiaries, Daimler-Benz classifies MBNA as a sales company, rather than a finance, manufacturing, holding, or service company. Although not mentioning MBNA specifically, Daimler-Benz related in its 1993 shareholder report that in the context of subsidiary administration, **it followed and assessed ongoing projects of subsidiary companies** and drafted decisions for the "internal bodies."[60]

The Third Court of Appeals' conclusion reflects a different legal analysis than used in this case. Whereas the First Court of Appeals saw the formal separateness of the companies as a bar to considering any of Preussag's contacts with the 11 Texas-based companies, the Third Court of Appeals simply asked whether those contacts were of sufficient quality to merit a jurisdictional finding:

> Our review of this evidence shows Daimler-Benz as a company devoted to selling its cars

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[60] 21 S.W.3d at 722 (emphasis added).

> worldwide, including in Texas. **To achieve this goal, Daimler-Benz has established subsidiaries in important markets around the globe. Although Daimler-Benz strictly observes corporate formalities, MBNA essentially connects Daimler-Benz to markets in the U.S., including Texas.** Daimler-Benz holds itself out to investors as a corporation that does business in all corners of the globe. MBNA's classification as a sales company demonstrates that its function is to generate sales for Daimler-Benz. . . . Daimler-Benz also exercises significant functions for MBNA and its other subsidiaries, such as obtaining financing and coordinating purchasing. Further, the management of Daimler-Benz closely supervises and directs the activities of its subsidiaries. **Thus, while formally separate, Daimler-Benz and MBNA form a functional whole in promoting and marketing vehicles in Texas.**[61]

In contrast, the First Court of Appeals' approach resulted in that court summarily discarding all the Texas contacts with the local companies on grounds that *alter ego* was not proven.[62] This approach is contrary to the principles of fundamental fairness outlined in *International Shoe.*

As in *Daimler-Benz,* the evidence here reflects that Respondent and its Texas affiliates form a "functional whole" in promoting Respondent's global business even though they are not *alter ego*s. Like Preussag, Daimler-Benz conducts business with affiliates in many parts of the world besides Texas.

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[61] 21 S.W.3d at 722-723 (emphasis added).

[62] 16 S.W.3d at 119-121.

This Court should review the issue of whether a full-blown finding of *alter ego* is required before a nonresident's contacts with Texas-based companies may be attributed to the nonresident.[63] This Court should review the policy considerations behind the law of personal jurisdiction. Especially in light of the current, post-September 11, 2001 geo-political climate. This case involves a well-structured, multinational company that conducts business with entities located in Texas. Requiring an injured plaintiff to *fully prove* a case of *alter ego* against a well-structured, international investment company during the preliminary part of a lawsuit (*i.e.*, to pierce the corporate veil before merits litigation), is inequitable, excessive, and pointless. In any event, fixation on *alter ego* confuses the issue; **it is the nonresident's regular business with various entities in the state that constitute the "minimum contacts" sufficient to sustain jurisdiction.** Respondent unquestionably has contacts with Texas in this case; unfortunately, the contacts are with related companies and hence have not fully been considered by the courts to date. This Court should recognize this principle. Misinterpretations of *Cannon* aside, this Court has never explicitly required that a plaintiff prove *alter ego* before weighing a nonresident's contacts with local entities. This Court should review this issue to clarify the law in this area.

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[63] 16 S.W.3d at 121-122.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari, and hear this case on its merits, or hold this case pending resolution of the *DaimlerChrysler AG v. Olson* case, should its petition be granted. Respondent Preussag AG has long conducted business in Texas by providing capital and financial services to entities in Texas, and as such, it should be fairly expected to stand trial in a Texas court. Petitioners request all relief to which they are justly entitled.

Respectfully submitted,

SPAGNOLETTI & CO.

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Attorneys for Petitioners,
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APPENDIX A

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 15, 2001

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Houston, TX 77002

RE: Case Number: 00-0617
Court of Appeals Number: 01-99-00502-CV
Trial Court Number: 94-C-1392

Style: MARSHALL COLEMAN, ET AL.
v.
PREUSSAG AKTIENGESELLSCHAFT

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the petition for review, as supplemented, in the above-referenced case. The motions to dismiss and for leave to supplement the petition for review were granted.

Sincerely,

John T. Adams, Clerk

by /s/ Patricia A. Cook
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Margie Thompson, Clerk
Mr. Jerry Deere

APPENDIX B

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
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January 10, 2002

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Ms. Kathy D. Patrick
Gibbs & Bruns
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Houston, TX 77002

RE: Case Number: 00-0617
Court of Appeals Number: 01-99-00502-CV
Trial Court Number: 94-C-1392

Style: MARSHALL COLEMAN, ET AL.
v.
PREUSSAG AKTIENGESELLSCHAFT

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/ Patricia A. Cook
Patricia A. Cook
Chief Deputy Clerk

cc: Ms. Margie Thompson, Clerk
Mr. Jerry Deere

APPENDIX C

PREUSSAG
AKTIENGESELLSCHAFT, Appellant,

v.

Marshall COLEMAN, et al., Appellees.*

No. 01-99-00502-CV.

Court of Appeals of Texas,
Houston (1st Dist.).

March 30, 2000

Rehearing Overruled May 5, 2000.

Kathy D. Patrick, Jennifer Horan Greer, Andrew L. Pickens, John Albert Basinger, Houston, for appellant.

Francis I. Spagnoletti, Houston, for appellees.

Panel consists of Justices COHEN, NUCHIA, and DUGGAN.[1]

OPINION

MURRY B. COHEN, Justice.

Preussag Aktiengesellschaft ("Preussag AG") takes this interlocutory appeal from an order denying its special appearance. *See* Tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(7) (Vernon Supp.2000). The issue in this appeal is whether a German holding corporation, whose relations with its indirect[2] Texas subsidiaries are virtually its sole Texas contacts, must defend, in a Brazoria County court, a cause of action based on its sales of products to Iraq, when those products were allegedly converted to weapons and later used against American soldiers. We answer this question in the negative. Therefore, we reverse and remand with instructions to dismiss Preussag AG for lack of personal jurisdiction.

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* A complete list of all appellees appears on pages i through xxvi of appellant's brief.

[1] The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, sitting by assignment.

I. Factual and Procedural Background

Appellees are veterans of the 1991 Persian Gulf War and some of their family members. Of the nearly 1800 plaintiffs in this case, approximately 185 are Texas residents. Appellees allege they were exposed to biological and chemical materials in Iraq or Kuwait during the war, resulting in physical and emotional injuries. Appellees maintain that the over 80 defendants, one of which is Preussag AG, sold Iraq the biological, chemical, and other materials that it then used in weapons.

In June 1994, appellees sued the defendants in Brazoria County, Texas, on theories of negligence and product liability. Preussag AG was not yet a defendant. The defendants removed the case to the federal court, where Preussag AG was added as a defendant. Preussag AG moved to dismiss for lack of personal jurisdiction, but Judge Kent dismissed the entire case for lack of subject-matter jurisdiction. *Coleman v. Alcolac,* 888 F.Supp. 1388, 1404 (S.D.Tex. 1995) (order granting motion to dismiss for lack of subject-matter jurisdiction and remanding cause to state court).

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[2] By "indirect subsidiaries," we mean those in which Preussag AG does not directly hold stock, but in which it has a financial interest by virtue of holding stock in another company that, in turn, holds stock in the Texas subsidiary.

On remand, Preussag AG specially appeared. The trial judge denied Preussag AG's special appearance without filing fact findings or legal conclusions. Preussag AG appeals.

II. Standard of Review and Burden of Proof

We review all evidence to determine if Preussag AG negated all possible grounds for personal jurisdiction. *Garner v. Furmanite Australia Pty., Ltd.,* 966 S.W.2d 798, 802 (Tex.App. - Houston [1st Dist.] 1998, pet. denied). Existence of personal jurisdiction is a question of law, but that determination must sometimes be preceded by the resolution of underlying factual disputes. *James v. Illinois Cent. R.R. Co.,* 965 S.W.2d 594, 596 (Tex.App. - Houston [1st Dist.] 1998, no pet.). When, as here, the trial judge files no fact findings, we presume all factual disputes were resolved to support the judge's decision. *Garner,* 966 S.W.2d at 802. While we generally review for factual sufficiency, we review de novo if the underlying facts are undisputed or otherwise established. *C-Loc Retention Sys., Inc. v. Hendrix,* 993 S.W.2d 473, 476 (Tex.App. - Houston [14th Dist.] 1999, no pet.).

III. Jurisdictional Test

A court may assert personal jurisdiction over a nonresident defendant only if the requirements of both the

Fourteenth Amendment's due process clause[3] and the Texas long-arm statute[4] are satisfied. *CSR, Ltd. v. Link,* 925 S.W.2d 591, 594 (Tex.1996) (orig.proceeding). Because the Texas long-arm statute reaches "as far as the federal constitutional requirements of due process will allow," the statute is satisfied if the exercise of personal jurisdiction comports with federal due process. *Id.*

Federal due process requirements are two-fold. First, the nonresident defendant must have purposefully established such minimum contacts with the forum state that it could reasonably anticipate being sued there. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985). If the nonresident defendant has purposefully availed itself of the privileges and benefits of conducting business in a state, it has sufficient contacts to confer personal jurisdiction. *Id.* Random, fortuitous, or attenuated contacts do not suffice. *Id.* It is the quality and nature of the contacts, rather than their number, that is important. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.,* 815 S.W.2d 223, 230 n. 11 (Tex.1991). Minimum contacts are particularly important when the defendant is a foreign national because of the unique and onerous burden of defending a suit in a foreign legal system. *Asahi Metal Indus. Co., Ltd. v. Superior Court,* 480 U.S. 102, 114, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987); *CSR, Ltd.,* 925 S.W.2d at 595.

Minimum contacts analysis is further divided into general and specific personal jurisdiction. *CSR, Ltd.,* 925

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[3] U.S. CONST. amend. XIV, § 1.

[4] TEX. CIV. PRAC. & REM.CODE ANN. § 17.042 (Vernon 1997).

S.W.2d at 595. Appellees concede that this is a case of general personal jurisdiction, which requires Preussag AG to show its contacts in Texas were not continuous and systematic. *Id.* To support a finding of general jurisdiction, the defendant's forum activities must have been "substantial," which requires stronger evidence of contacts than for specific personal jurisdiction.[5] *Id.*

Second, if the nonresident defendant has purposefully established minimum contacts with the forum, the exercise of jurisdiction must comport with fair play and substantial justice. *Burger King Corp.*, 471 U.S. at 477, 105 S.Ct. at 2184; *Guardian Royal*, 815 S.W.2d at 231

IV. Jurisdictional Facts

The following evidence was developed at the special appearance hearing. Preussag AG is a publicly traded German corporation headquartered in Hanover, Germany. It is an investment holding company, with direct and indirect investments in 500 to 600 subsidiaries worldwide. It does not manufacture anything. It is not authorized by the state government of Texas to do business in Texas, and it does not manufacture or sell products, have an office, keep business records, solicit business, own real property, or have an agent for service of process in Texas. Preussag AG did not enter into contracts in Texas for the products it sold to Iraq, and the sales of these products took place entirely outside Texas.

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[5] Specific personal jurisdiction exists if the defendant's alleged liability arises from or is related to an activity conducted within the forum. *CSR, Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex.1996).

A. Preussag AG's Six Indirect Subsidiaries in Texas

Preussag AG does, however, own indirect interests in six companies that do business in Texas: (1) Delta Steel, Inc. ("Delta"), (2) Cron Chemical Corporation ("Cron"), (3) Deutag Marketing and Technical Services, Inc. ("DMTS"), (4) PB-KBB Inc., Houston ("PB-KBB"), (5) Pipetronix, Houston ("Pipetronix"), and (6) Triple D Supply Corporation Dallas ("Triple D"). Like many of Preussag AG's worldwide subsidiaries, the indirect Texas subsidiaries are part of what the parties call the "Preussag Group" of companies. Appellees allege that Preussag AG's contacts with these six Texas subsidiaries make it amenable to suit in Texas. Therefore, we discuss these indirect six Texas subsidiaries further below.

B. The Subsidiaries that were Sued

Besides Preussag AG, appellees also sued five direct or indirect subsidiaries of Preussag AG: (1) Deutshe Tiefbohr AG ("Deutag"); (2) Preussag Handel; (3) Preussag North America ("PNA"), formerly Preussag Industrial Corporation ("PIC"); (4) Preussag Stahl AG ("Stahl"); and (5) Preussag Anlagenbau GmbH ("Anlagenbau"), the only directly owned subsidiary. Although these five subsidiaries were not Texas corporations, they did not contest personal jurisdiction.

Appellees' "live" petition at the time of the hearing alleged that Preussag AG and these five subsidiaries were alter egos of each other for liability purposes, but appellees now admit that these five subsidiaries "are not the foundation of the jurisdictional finding" in this case, through alter ego or agency theory or otherwise. Therefore, we discuss them only insofar as they relate to the six indirect Texas subsidiaries on which appellees' jurisdictional argument rests.

C. Preussag AG's Relevant Operational Scheme

Following are what the parties identify as the relevant aspects of the Preussag Group's operational scheme. This operational scheme applies to at least some of the six indirect Texas subsidiaries.

German law requires Preussag AG to publish an annual, consolidated financial statement including the financial information of any subsidiary in which it owns a 50 percent minimum interest. To comply, Preussag AG periodically requests financial information from its subsidiaries. This is sometimes accomplished by the subsidiaries' reporting their information to another Preussag Group company, which then forwards it to Preussag AG; other times, the subsidiaries report directly to Preussag AG.

To prepare these financial reports, some Preussag Group companies, including at least some of the six indirect Texas subsidiaries, use Preussag AG's "Greenbook," which uses standard German accounting procedures. Preussag AG keeps all the reported data in a computer database; therefore, Preussag Group companies receive

Preussag AG's Holding Management Handbook on how to enter this data.

Preussag AG has extended lines of credit, made on commercially reasonable terms and at market-rate interest, to some of the Preussag Group companies. It also has certain cash-management procedures for group companies. For example, to facilitate foreign-currency payments by some of its German subsidiaries, Preussag AG has foreign currency accounts through which it makes payments on their behalf. The Preussag Group companies are expected to use these accounts for such payments.

Preussag AG also provides "banking" services to some Preussag Group companies to facilitate intercompany dividend payments, loan repayments, or payments for services and products sold between group companies. These "banking" services are more akin to a debit/credit or clearing-account system. For example, on the subsidiaries' instructions, Preussag AG debits or credits their accounts monthly, depending upon which company bought and which sold goods or services that month. The participating Preussag Group companies also receive a monthly report, like a checking account statement, reflecting the month's debits, credits, and current balance. As part of this system, the participating Preussag Group companies may open new bank accounts only with the approval of Preussag AG's financial department, and excess funds from the participants' bank accounts are transferred daily to Preussag AG. This is not an accounting system, as each subsidiary maintains its own accounting system.

Each Preussag Group subsidiary has its own primary insurance, but Preussag AG's excess liability policy also covers its subsidiaries in which it holds a 50 percent minimum interest. At one time, Preussag AG studied the feasibility of consolidating the total employee benefit package for the Preussag Group's U.S. subsidiaries. A memorandum shows that Preussag AG representatives attended two meetings in 1992 or 1993, one in Florida and the other in Illinois, for this purpose.

Preussag AG sometimes provides administrative assistance to the Preussag Group companies at the companies' cost, *e.g.*, insurance brokerage services, computer support, and project financing for some of the Preussag Group companies' customers.

D. Specific Preussag AG Contacts with the Six Indirect Subsidiaries in Texas

In addition to the contacts under the Preussag Group's general operational scheme, appellees argue the following contacts between Preussag AG and its six indirect Texas subsidiaries show personal jurisdiction.

1. Delta

Delta is a Texas corporation providing general warehousing, offering value-added processing, and producing plates, coil, and tubing. It is owned 55 percent by PNA, which is owned 100 percent by Salzgitter Huttenwork GmbH, which in turn is owned 100 percent by Preussag AG. Delta buys some steel products from, is managed by, and reports to Preussag Handel, which is 100 percent owned by Preussag Stahl, which in turn is owned 99.5 percent (directly or indirectly) by Preussag AG.

Pursuant to Preussag Handel's regulations, Delta submits capital expenditure requests over $40,000 to Preussag Handel for its approval; Preussag Handel in turn submits the requests for Preussag AG's approval. Delta has also provided Preussag AG with proposed capital budgets for approval and comment. Using the Greenbook, Delta reports its financial and related information regularly to Preussag Handel, which sends it to Preussag AG for the annual, consolidated financial statement required by German law. Preussag AG has apparently also transferred funds to Preussag Handel's account on Delta's behalf, under the Preussag Group cash-management system discussed above, to pay for sales from Preussag Handel to Delta.

Appellees also point to the following direct contacts between Preussag AG and Delta. The record contains copies of 11 letters between the two companies from 1993 through 1995. One is a letter asking Delta for a copy of a rent contract and an explanation why certain Delta executives' salaries had increased, although Delta's president testified that Preussag AG's approval was not needed for salary expenditures. Some others concern the reporting for Delta that Preussag AG must compile. Delta's phone records also reflect it made about 35 calls over several years to Hanover, where Preussag AG is headquartered. In 1994, Preussag AG's new board chairman once met in Boston with officers of all U.S. Preussag Group subsidiaries, including Delta's president, to discuss their products, expectations, and performance and the chairman's global philosophy. The only other meeting between Delta and Preussag AG representatives was in 1995, when someone from Preussag AG's corporate development department came to Houston while "visiting various companies to see their operations." Preussag AG once wrote what Delta's president described as a "comfort letter" that could be used in support of loans that Delta's parent company, PIC (now PNA), would take out on Delta's behalf. The letter said Preussag AG would use its influence on PIC to ensure PIC met any obligations under the credit agreements PIC executed for Delta's benefit. We have found no evidence that this comfort letter was written for or sent to Texas banks, and Delta's president testified PIC's lenders at the time were not in Texas. Finally, every few years and at its own expense, Preussag AG sent either its own auditors or those of Price Waterhouse to audit Delta.[6]

2. Triple D

Triple D is a Texas corporation that supplies drilling equipment mainly to a Preussag Group drilling company. Triple D is owned by Deutag Friesland BV, which is owned by Deutag. The evidence conflicts whether Preussag AG owns Duetag directly, or whether Deutag is 100 percent owned by Preussag Energie GmbH, which Preussag AG did not fully acquire until 1991. Under its cash-management system described above, Preussag AG has transferred funds to Triple D's Houston bank account on Deutag's behalf, to pay for sales from Triple D to Deutag.

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[6] Appellees correctly note that PNA (formerly PIC) extended Delta a $30 million open line of credit. However, this fact does not concern *Preussag AG's* actions, as appellees disavow any attempt to pierce the corporate veil between Preussag AG and PNA.

Triple D's audits are sent to Preussag AG's auditors. Triple D now reports its financial information to Deutag, but for a few years during the 1980s, it reported to Preussag AG directly using the Greenbook.

3. PB-KBB

PB-KBB, a Delaware corporation with a Houston office, specializes in subsurface systems and technology. PB-KBB is owned half by a Preussag Group company (KBB) and half by a company outside the Preussag Group. Preussag AG has extended lines of credit to PB-KBB at market-rate interest. Some of these loans were deposited into PB-KBB's Texas bank account. The record contains several faxes and memoranda of phone conversations discussing potential or actual loans from Preussag AG to PB-KBB from 1987 to 1992. There was contrary testimony from PB-KBB's vice-president of finance that PB-KBB did not borrow from Preussag AG, but we presume the judge found it did, as there were no fact findings to settle this conflicting evidence. The record also shows that PB-KBB sometimes requested to borrow or got loans from (1) Preussag Finance BV, (2) an undefined "Preussag," and (3) PIC (now PNA), as well. Preussag AG once sent its own auditors, and another time sent those of Price Waterhouse, to audit PB-KBB.

4. Pipetronix

Pipetronix is a Texas corporation that offers pipeline inspections and cleaning services in the U.S. mainly for Pipetronix GmbH. Pipetronix became part of the Preussag Group in 1991 and is a wholly owned subsidiary of PNA, a corporation headquartered in Chicago that is the holding company for most of the Preussag Group's U.S. companies. Pipetronix's phone records show it called Germany very often over several years. A Pipetronix officer testified many calls were likely to Pipetronix GmbH, located in Karlsruhe, Germany, because the two companies frequently spoke by phone, but it appears that roughly a third were to Hanover, where both Preussag AG and Anlagenbau were headquartered in the same building. Because Anlagenbau is the parent of Pipetronix GmbH, for which Pipetronix provides services, the same Pipetronix officer speculated that his office might have sometimes called Anlagenbau, but Preussag AG did not show how many of the calls to Hanover were to it or to Anlagenbau. Using the Greenbook, Pipetronix provides its financial reports to PNA, which forwards them to Preussag AG. Finally, to show Preussag AG's "pervasive" control over Pipetronix, appellees rely on the following testimony of a Pipetronix officer, explaining how he had heard of Preussag AG:

> I suppose daily in conversation – not daily, but in conversation around the office, obviously there's reference to who Preussag [AG] is, but not ever in any relationship as to any reporting to them or anything. . . . I think it's more an identity thing, as far as we're concerned, in that Preussag [AG] is the big mother in the sky up

> there somewhere, you know, and I think we can all identify that we are a part of the Preussag AG companies, but other than that, no relationship at all.[7]

5. DMTS

DMTS has offices in Houston and is owned by Deutag. Deutag and DMTS, which markets drilling services, conduct drilling business in the U.S. A deposit slip indicates that Preussag AG paid some of DMTS's invoices to Deutag, depositing funds into DMTS's Texas bank account.

6. Cron

Cron is a Texas company that is owned by Amalgamet, Inc. Using the Greenbook, Cron reports its financial and operations information to Amalgamet's London office, which sends the information to Preussag AG for the annual, consolidated financial statement required by German law. Deloitte & Touche prepares Cron's year-end account for Preussag AG.

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[7] Appellees' brief correctly states that PNA extended Pipetronix a line of credit. However, this fact does not concern *Preussag AG's* actions, as appellees disavow any attempt to pierce the corporate veil between Preussag AG and PNA.

E. Other Actions by Preussag AG

1. Contracts

In 1986, Preussag AG sold its stock in Preussag Oil & Gas back to the corporation. The agreement recites it is "governed by the laws of the State of Texas."

In 1992, PB-KBB merged into Preussag Oil & Gas. The agreement recited that these two companies had approved the merger "pursuant to the Texas Business Corporation Act." Preussag AG also signed the agreement, but solely as indemnitor for pre-merger environmental liability of Preussag Oil & Gas, its former indirect subsidiary. The agreement was to be "governed by, and construed in accordance with, the laws of the State of Texas."

2. Texas Attorneys

From about 1986, Vinson & Elkins's Houston office performed various services for Preussag AG or its subsidiaries. For example, the two contracts discussed above were possibly executed with the firm's assistance, as copies of the agreements were in its records.

Appellees first point to around 27 invoices for the firm's services from 1986 to 1993, some including fairly substantial fees. Some invoices were billed to Preussag Oil & Gas's account, but most were billed to that of "Preussag AG," showing a Houston address. However, it appears the vast majority of these invoices were mailed to *Preussag Oil & Gas* in Houston, not Preussag AG, or were for services that could have been rendered only for the former. The record also contains a 1990 phone message instructing that invoices should be billed to the account of "Preussag Oil & Gas," not "Preussag AG." Nevertheless, because there are no fact findings, we must presume the trial judge found that at least the few invoices that (1) were not mailed to Preussag Oil & Gas or (2) did not itemize services that could have been performed only for Preussag Oil & Gas were for the firm's work for Preussag AG.

Appellees also point to about 16 items of correspondence between Preussag AG and the firm from 1993 to 1996. Some of these referenced travel plans or meetings, a few were personal, and others concerned an attorney's service on PNA's board after this lawsuit was filed. In 1996, Preussag AG agreed to hold that attorney harmless from liability he might incur as a PNA board member.

V. Discussion

Because the Texas long-arm statute reaches as far as federal due process allows, we need examine only whether the exercise of personal jurisdiction over Preussag AG comports with federal due process. *See CSR, Ltd.*, 925 S.W.2d at 595.

Appellees argue that Preussag AG is subject to Texas's general jurisdiction because Preussag AG (1) has a close business relationship with its six indirect Texas subsidiaries, (2) once wrote a comfort letter on one's behalf, (3) twice contracted with Texas entities, and (4) employed a Houston law firm. Under these facts, we disagree.

A. Preussag AG's Relationship with its Six Indirect Texas Subsidiaries

Appellees disavow any alter ego[8] or agency theory of personal jurisdiction, *i.e.*, they do not attempt to impute the six indirect Texas subsidiaries' activities to Preussag AG. Rather, they focus on Preussag AG's normal, corporate actions within the Preussag Group system – such as occasional audits; unified financial procedures for the annual reporting required by German law; a unified "banking" system, involving loans and intercompany payments and requiring some deposits into the subsidiaries' Texas bank accounts; parent approval of large expenditures and budgets; consideration of adopting a group benefits system; and the communications and visits that accompany these activities – directed at these six indirect Texas subsidiaries.

1. Texas and Fifth Circuit Case Law: Personal Jurisdiction over Nonresident Parent Corporation

In support, appellees rely on four Texas or Fifth Circuit cases for the proposition that a "close business relationship" between a foreign parent company and its Texas subsidiary can justify subjecting the parent to Texas jurisdiction. *See Conner v. ContiCarriers & Terminals, Inc.*,

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[8] The alter ego theory generally allows one corporation's actions to be ascribed to another by disregarding their distinct corporate entities. *See, e.g.*, *Lucas v. Texas Indus., Inc.*, 696 S.W.2d 372, 374 (Tex.1984) (corporate form normally not disregarded absent its use for fraudulent purposes, to avoid liability, or under like exceptional circumstance).

944 S.W.2d 405, 418 (Tex.App. – Houston [14th Dist.] 1997, no writ) (plurality opinion); *3-D Elec. Co. v. Barnett Constr. Co.*, 706 S.W.2d 135, 139 (Tex.App. – Dallas 1986, writ ref'd n.r.e.); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir.1983) (Texas); *Walker v. Newgent*, 583 F.2d 163, 167 (5th Cir.1978) (Texas). However, the court in each of these cases was performing an alter ego analysis to pierce the veil between parent and subsidiary:[9]

> Arguing that ContiCarriers is the "alter ego" of its parent company, Continental Grain, the Conners contend that Continental Grain's Texas contacts should be imputed to ContiCarriers. ContiCarriers is the wholly owned subsidiary of Continental Grain, which operates several grain elevators and maintains offices in Texas. *Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state simply because its subsidiary is present or doing business there.* The mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent. *In some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent "does business" in a jurisdiction through the local activities of its subsidiaries. The rationale for such an exercise of jurisdiction is that the parent corporation exerts such dominance and control over its subsidiary "that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction."* These principles apply not only in the situation where jurisdiction is sought over the

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[9] Moreover, each court found there was no jurisdiction over the parent corporation under an alter ego theory.

> parent corporation through its subsidiary's local activities, but also when jurisdiction is sought over the subsidiary through its parent corporation.

Conner, 944 S.W.2d at 418 (citations omitted, emphasis added); *accord 3-D Elec.,* 706 S.W.2d at 139 (applying same analysis to determine whether two companies, which were not parent and subsidiary, were each other's alter ego); *Hargrave,* 710 F.2d at 1159 (applying same rule in alter ego analysis); *Walker,* 583 F.2d at 167 (same).[10] These cases do not create a rule that, outside an alter ego situation, a parent's normal relationship with its subsidiary, pursuant to an overarching system that is not directed at any particular state, suffices to subject the parent to jurisdiction in its subsidiary's state.

In fact, *Conner* implies the opposite. *See id.,* 944 S.W.2d at 417-19. In *Conner,* it was undisputed that the two corporations maintained "significant ties," including the sharing of headquarters outside Texas; a unified payroll and benefits system; the Texas parent's provision of legal, accounting, and other services to the nonresident subsidiary; and the fact that 50 percent of the subsidiary's revenue came from servicing the parent corporation. *Id.* at 419. The plaintiffs argued both that (1) the nonresident subsidiary had direct contacts with Texas and (2) its Texas parent's actions could be imputed to the nonresident subsidiary under an alter ego theory. *Id.* Nonetheless, in discussing the subsidiary's *direct* contacts with Texas, neither the plaintiffs nor the court considered the nonresident subsidiary's everyday relations (unified benefits and payment systems, intercompany services, profit flow, etc.) with its Texas parent. *See id.* at 417. Rather, they considered these parent-subsidiary contacts only in connection with the *alter ego* analysis. *See id.* at 418-19. Although the case was not decided on this point, we would expect that, if such routine parent-subsidiary contacts were important in determining the nonresident subsidiary's *direct* contacts with Texas, someone in *Conner* would have said so. No one did.

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[10] *Accord, see Garner v. Furmanite Australia Pty., Ltd.,* 966 S.W.2d 798, 802 (Tex.App. – Houston [1st Dist.] 1998, pet. denied); *McFee v. Chevron Int'l Oil Co.,* 753 S.W.2d 469, 471 (Tex.App. – Houston [1st Dist.] 1988, no writ); *Jones v. Beech Aircraft Corp.,* 995 S.W.2d 767, 771-72 (Tex.App. – San Antonio 1999, pet. dism'd); *Alpine View Co. Ltd. v. Atlas Copco AB,* No. 97-20879, at 214 (5th Cir. 2000) (op. on remand) (Texas); *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483, 492-93 (5th Cir.1974) (Texas); *Murdock v. Volvo of Am. Corp.,* 403 F.Supp. 55, 56-57 (N.D.Tex.1975) (Texas). *Cf. Vosko v. Chase Manhattan Bank, N.A.,* 909 S.W.2d 95, 99-100 (Tex.App. – Houston [14th Dist.] 1995, writ denied) ("Similarly, jurisdiction over an individual generally cannot be based on jurisdiction over a corporation with which he is associated unless the corporation is the alter ego of the individual."); *Solow v. Century Assets Corp.,* 12 S.W.3d 512, 515-16 (Tex.App. – Beaumont 1999, no pet.) (same); *Stuart v. Spademan,* 772 F.2d 1185, 1196-97 (5th Cir.1985) (Texas) (same).

Bearry v. Beech Aircraft Corporation is also instructive. 818 F.2d 370 (5th Cir.1987). In *Beech,* the survivors of two individuals killed in a Beech aircraft in Mississippi sued Beech in Texas on product liability theories. *Id.* at 372. Beech engaged in a nationwide marketing campaign, during which nearly $250 million of its products flowed to 17 independent Texas dealers. *Id.* at 373. Beech representatives occasionally visited the Texas dealers at the dealers' request. *Id.* One of the Texas dealers was a wholly owned subsidiary of another Beech subsidiary. *Id.* Regarding this "indirect" Texas subsidiary, the *Beech* court noted that "because [the indirect subsidiary] is operated as a distinct corporation, the district court properly held that its contacts with Texas could not be imputed to Beech." *Id.* However, the district court had also characterized the independent Texas dealers as "Beech retailers," implicitly attributing their activities to Beech, despite Beech's lack of control over their operations. *Id.* at 375 & n. 2 ("Although the district court noted that the activities of the independent dealers could not be attributed to Beech, it found the existence of the distribution system in Texas to establish conduct by Beech within that forum."). The district court had further characterized all aircraft sales to Beech's Texas dealers as occurring in Texas, although all sales were negotiated and completed in Kansas. *Id.* at 375. The Fifth Circuit Court of Appeals rejected these two characterizations:

> But Beech exercised its right to structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states such as Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas. Beech has not afforded itself the benefits and protections of the laws of Texas, but instead has calculatedly avoided them.

Id. at 375-76. It further held that "distributors selling Beech manufactured products for their own account do not create minimum contacts sufficient to warrant general jurisdiction over Beech. *Id.* at 376. Beech has no office in Texas, has no agents in Texas, and has no control over the Texas dealers. *Id.* at 377. As such, Beech is not 'doing business' in Texas." *Id.* at 376. We conclude that *Beech* generally supports Preussag AG's position.

Dalton v. R & W Marine, Inc. also supports Preussag AG's position. 897 F.2d 1359 (5th Cir.1990). *Dalton* involved the Louisiana long-arm statute, which, like that of Texas, extended to the limits of due process. *Id.* at 1361. In *Dalton,* the plaintiff sued his employer. *Id.* at 1360. He also sued Hartley Marine Corporation, of which the plaintiff's employer was an unincorporated division, and Midland Enterprises, Hartley's nonresident parent corporation. *Id.* at 1360-61. Midland was a holding company with multiple subsidiaries, including five incorporated under Louisiana law and four licensed to do business there. *Id.* at 1361. Midland had no employees, offices, or property in Louisiana, and it did not conduct business there. *Id.* However, Midland owned most of the vessels its Louisiana subsidiaries used, bareboat chartered[11] the vessels to them (yielding about 12.9 percent of Midland's total revenues), advertised nationally, and sometimes bought vessels at marshals' sales within the state. *Id.*

The plaintiff argued that Midland was subject to Louisiana's general jurisdiction because it (1) had direct contacts with Louisiana and (2) was the alter ego of its subsidiaries. *Id.* In rejecting the first argument (direct contacts), the *Dalton* court held as follows:

> Dalton asserts that Midland bareboat charters its boats to its Louisiana subsidiaries . . . , engages in advertising that reaches Louisiana, and has purchased vessels at marshals' sales within the

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[11] A bareboat charter vest most incidents of ownership in the charterer operating the vessel. *Id.* at 1362.

> state. These contacts, however, are not sufficiently systematic and continuous to constitute a general presence in the state. The strongest support for jurisdiction is Midland's bareboat charters, which by definition vest most of the incidents of ownership in the charterer operating the vessel. Although Midland's continued ownership of these vessels presents a somewhat more "continuous and systematic" presence in the state than Beech's airplane sales in *Bearry*, like Beech, Midland takes care that these charters are entered into, and payments made pursuant to them are remitted, in Cincinnati. A corporation's "obvious intent to exercise its due process rights" should not be disregarded lightly.[12]

Id. at 1362 (internal citations omitted). In short, the direct contact analysis included such things as bareboat chartering contracts with the subsidiaries, but did not include the type of intercorporate activities, such as unified banking and benefit schemes and communications, on which appellees rely to show Preussag AG's general presence in Texas. In contrast, when the *Dalton* court rejected the second argument (alter ego), it considered these contacts:

> Several factors point to Midland as the alter ego of its subsidiaries. Midland owns 100% of its subsidiaries and remains responsible for general policy. Its subsidiaries funnel their revenues into

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[12] The Dalton court also held that neither Midland's advertising, the emphasis of which was national, nor its vessel purchases, for which the sale contracts were executed, paid, and delivered outside Louisiana, provided for jurisdiction. *Id.* at 1362 n. 3.

> centralized bank accounts and file a consolidated federal tax return with Midland. Finally, Midland offers benefit plans to its subsidiaries' employees. Nonetheless, these factors are outweighed, albeit modestly, by the fact that Midland observes corporate formalities, makes its subsidiaries responsible for daily operations including all personnel decisions, and allows each subsidiary to keep its records and accounts in separate books and file its own state tax return. Having concluded that Midland cannot be considered the alter ego of its subsidiaries, we need not address whether Hartley can be considered the alter ego of Midland.

Id. at 1363. *Dalton* indicates that the type of parent-subsidiary contacts appellees rely on to show jurisdiction over Preussag AG – such as unified banking and benefits schemes, *i.e.*, those routinely occurring under the overall Preussag Group system – are more properly considered as part of an alter ego analysis, rather than as examples of Preussag AG's direct contacts with Texas. *See also Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 214 (5th Cir. 2000) (op. on remand) (holding (1) foreign holding company was not subject to Texas jurisdiction because of its subsidiaries' activities there absent alter ego showing; (2) considering holding company's receipt of dividends from, interest-bearing loans to, and percentage ownership in subsidiaries only in alter ego analysis; and (3) concluding no alter ego showing was made).

2. Other Jurisdictions' Case Law: Personal Jurisdiction over Nonresident Parent Corporation

Appellees rely on four decisions of the federal district court for the eastern district of Wisconsin, each of which we distinguish. In *Handlos v. Litton Industries, Inc.*, the court considered whether two wholly owned subsidiaries, which plaintiff served with process on behalf of their nonresident parent corporation, were the parent's agents or alter egos, so that the parent was "doing business" under the Wisconsin long-arm statute through them. 304 F.Supp. 347, 348 (E.D.Wis.1969). The *Handlos* court concluded there was sufficient evidence of both, and it denied the motion to dismiss. *Id.* at 350-51. Here, in contrast, appellees disavow either agency or alter ego theory.

Appellees also rely on *Hayeland v. Jaques*, in which there was federal-question jurisdiction based on federal statute. 847 F.Supp. 630, 632 (E.D.Wis.1994). The *Hayeland* court first noted that, when a federally created right is at issue, the Fifth Amendment's due process clause applies, rather than that of the Fourteenth Amendment. *Id.* It then adopted the minority view that, to determine personal jurisdiction when a federal question is involved, the court need look only to a defendant's "national contacts," rather than to its contacts with the state in which the federal court sits:

> When exercising the power of the national sovereign, logic suggests that a federal court is not limited by the same constitutional concerns that limit the power of a state sovereign. Of course, a

> forum state's long-arm statute must still be satisfied. . . . But once the requirements of the long-arm statute are met, the only due process concern should be whether the defendant has sufficient *national contacts* such that the exercise of jurisdiction by the nation's courts under the nation's laws does not offend traditional notions of fair play and substantial justice. *Here, it is clear that [the nonresident defendant] has extensive contacts with the United States.* The only remaining question is whether jurisdiction is satisfied under Wisconsin's long-arm statute.

Id. at 634 (emphasis added). The *Hayeland* court then concluded that the nonresident defendant was amenable to suit under the Wisconsin long-arm statute through the actions of its Wisconsin subsidiary, because case law interpreting that statute had held a subsidiary's actions could be so considered.[13] *Id.* In contrast, a "national contacts" analysis does not apply in state court, and *Hayeland* was decided under statute, not the due process clause.

Appellees next rely on *Brunswick Corp. v. Suzuki Motor Co., Ltd.*, in which a Wisconsin manufacturer sued two Japanese manufacturers for patent infringement. 575 F.Supp. 1412, 1415 (E.D.Wis.1983). The Japanese companies sold products other than those at issue in the suit through partially or wholly owned U.S. subsidiaries, which in turn made substantial sales of these products in

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[13] The Wisconsin long-arm statute provided for jurisdiction over a defendant that "is engaged in substantial and not isolated activities within this state, *whether such activities are wholly interstate, intrastate, or otherwise.*" Wis. Stat. § 801.05(1)(d) (1994) (emphasis added).

Wisconsin. *Id.* at 1415-16. The *Brunswick* court held as follows:

> This court believes that the constitutional analysis under *International Shoe* [*v. State of Wash., Office of Unemployment Compensation and Placement,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)] permits consideration of a nonresident defendant's contacts with the forum state through its wholly owned subsidiaries without regard to whether the affiliated corporations have maintained a formal separation of corporate identities. Thus, *Cannon*[14] does not preclude this Court from considering the Wisconsin contacts of the [two Japanese parent corporations'] subsidiaries in judging the fairness under the due process clause of requiring the Japanese parents to defend themselves in this forum.

Id. at 1419. Without using agency or alter ego theories, the *Brunswick* court then held that, considering the *subsidiaries'* activities, it could exercise jurisdiction over the *parent* corporations under both the Wisconsin long-arm statute and the due process clause. *Id.* at 1422-23. We distinguish *Brunswick* in that the parent corporations there were using their subsidiaries to market and sell the parents' products, while here, Preussag AG is not marketing anything through its Texas subsidiaries. *See id.* at 1415-16. To the extent *Brunswick* is not distinguishable, though, we find it contrary to the Texas precedent cited above, requiring alter ego or agency theory for a subsidiary's actions to be attributed to the parent for jurisdictional purposes. *See Conner,* 944 S.W.2d at 418; *McFee v. Chevron Int'l Oil Co., Inc.,* 753 S.W.2d 469, 471 (Tex.App. – Houston [1st Dist.] 1988, no writ); *Beech,* 818 F.2d at 375-76. *Cf. 3-D Elec.,* 706 S.W.2d at 139 (applying same rule between two corporations that were not parent and subsidiary).

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[14] *Cannon Mfg. Co. v. Cudahy Packing Co.,* 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1925).

Appellees also rely on *Johnson Worldwide Associates, Inc. v. Brunton Co.,* which involved a 15-year licensing agreement between two unrelated corporations – one of which was a resident (Johnson Worldwide) and one of which was not (Silva, Brunton's parent) – under which the parties' business dealings were extensive. 12 F.Supp.2d 901, 904-05, 907-08 (E.D.Wis.1998). In fact, because the dispute arose out of the termination of that licensing agreement, the *Johnson* court held it also had specific, as well as general, personal jurisdiction over the nonresident corporation. *Id.* at 911. *Johnson Worldwide* is, therefore, distinguishable.

Finally, appellees cite *Lung v. Yachts International, Ltd.,* in which the court determined it had specific jurisdiction – a less rigorous test – over a nonresident that allegedly breached a contract and defrauded Wisconsin state residents. 980 F.Supp. 1362, 1367-68 (D.Hawai'i 1997). *Lung* is likewise distinguishable.

3. Application

We conclude that Preussag AG's routine activities within the Preussag Group system with its six indirect

Texas subsidiaries do not make Preussag AG amenable to suit in Texas.

The six indirect Texas subsidiaries' use of Preussag AG's "banking" and financing systems does not show Preussag AG's purposeful contacts with Texas. Preussag AG's services were provided to the six indirect Texas subsidiaries as they would be to any member of the Preussag Group in any location. In *Primera Vista S.P.R. de R.L. v. Banca Serfin, S.A. Institucion de Banca Multiple Grupo Financiero Serfin,* the court held a Mexican bank's (1) $1.5 billion in "pass-through" accounts in 11 U.S. banks, through which it facilitated its Mexican clients' foreign transactions, and (2) lines of credit the Mexican bank maintained with Texas banks, but which were used only to support the Mexican bank's clients that imported U.S. goods, did not result in general jurisdiction. 974 S.W.2d 918, 926 (Tex.App. - El Paso 1998, no pet.). The *Primera Vista* court reasoned as follows:

> Although Banca Serfin charged its Mexican customers for use of the Texas bank accounts and lines of credit, its maintenance and use of the accounts is more in the nature of facilitating its Mexican customers' business activities. Accordingly, there was evidence from which the trial court could have reasonably concluded that Banca Serfin's Texas accounts are a by-product of Banca Serfin's business in Mexico with Mexican importer customers rather than an indication of any substantial, purposeful business activity conducted by Banca Serfin on its own behalf in Texas. By maintaining and charging for the use of the Texas accounts, Banca Serfin clearly conducts some marginal business activity in the state. This activity alone, however, is

> somewhat attenuated and not substantial enough to subject Banco Serfin to suit in Texas for all purposes.

Id. at 926. Like the pass-through accounts of the Mexican bank in *Primera Vista,* Preussag AG's "banking" system – in which Preussag Group members deposit excess funds daily with Preussag AG, Preussag AG lends money on commercial terms, Preussag AG credits and debits members' accounts for inter-member sales, and foreign currency transactions are conducted – exists to accommodate the whole Preussag Group, of which Preussag AG is a part. The fact that Preussag AG deposits funds under this system in some subsidiaries' Texas bank accounts is a fortuitous contact, since the "banking" system is not itself directed toward Texas. *Cf. Alpine View,* at 214 (in holding foreign holding company's Texas subsidiaries were not its alter ego and, thus, Texas had no jurisdiction over former, stating, "The existence of intercorporate loans does not establish the requisite [alter ego] dominance, and, in fact, interest-bearing loans suggest separation of corporate entities.") (citations omitted). Therefore, we conclude that Preussag AG did not purposefully avail itself of conducting business in Texas.

Neither do we place much weight on the communications between some of the six indirect Texas subsidiaries and Preussag AG. In all, appellees' brief cites to fewer than 60 written communications – including currency exchange and deposit confirmations – among Preussag AG and all six Texas subsidiaries from 1987 to 1995. Many of these written communications concerned the financial reporting required by German law, periodic audits, or loans under the Preussag Group "banking" system, all of which we consider part of the normal relations between this parent and its subsidiaries. For the same reason, it is not surprising that Preussag AG and Delta and Pipetronix would communicate by phone.[15]

Aside from occasional visits of Preussag AG representatives for audits, and once for an inspection of Delta, the only other visits between Texas subsidiaries' personnel and that of Preussag AG were outside of Texas. Occasional travel to Texas is insufficient by itself to establish continuous and systematic contact. *See Garner,* 966 S.W.2d at 803 (holding no general jurisdiction over individual who made eight to 10 visits over 60 days to Texas); *compare Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 418, 104 S.Ct. 1868, 1870, 1874, 80 L.Ed.2d 404 (1984) (finding no general personal jurisdiction despite defendant corporation's sending management and personnel to Texas for consultation and training over seven-year period). Moreover, we perceive Preussag AG's monitoring of its six indirect Texas subsidiaries through periodic audits, and its approval of Delta's large expenditures, as part of the normal, parent-subsidiary relationship between these companies.

The fact that the six indirect subsidiaries reported financial information that was relayed to Preussag AG does not weigh in favor of finding jurisdiction, either. This information was required by German law, not just for Preussag AG's own benefit, and was apparently part of the normal parent-subsidiary relationship under the Preussag Group system. Neither is it surprising that Preussag Group companies would use a unified software and reporting system to compile this information. This activity was directed at *all* subsidiaries in which Preussag AG had at least a 50 percent interest, not just at subsidiaries in Texas. The mere existence of a unified, international system between a parent and its subsidiaries does not show purposeful availment of Texas's benefits.

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[15] Moreover, Delta called Hanover (presumably Preussag AG) only about 35 times over several years, and we cannot discern how many of Pipetronix's calls to Hanover were to Preussag AG or to Anlagenbau, the latter of which Pipetronix's officer speculated his company might have sometimes called.

Finally, the excess liability policy Preussag AG maintains for its subsidiaries benefits them, not it, and does not show purposeful availment of anything in Texas.

B. Preussag AG's Comfort Letter

Preussag AG wrote a "comfort letter" that could be used in support of loans that *PNA* might take out on Delta's behalf. There is no showing the letter was written to or for a Texas lender, as Delta's president testified none of PIC's lenders was in Texas, and there is nothing systematic or continuous about it in any event.

C. Preussag AG's Two Contracts

We do not find Preussag AG's contracting twice, six years apart, with Texas corporations to show systematic and continuous contact with Texas.

Mere contracting with a Texas resident does not satisfy the minimum contacts requirement. *See, e.g., Magnolia Gas Co. v. Knight Equip. & Mfg. Corp.*, 994 S.W.2d 684, 691

(Tex.App. – San Antonio 1998, no pet.) (contract dispute). In the 1986 transaction, Preussag AG sold back its stock in Preussag Oil & Gas. If anything, this shows Preussag AG's desire to distance itself from Texas. Likewise, the 1992 merger was between PB-KBB and Preussag Oil & Gas. Appellees rely on the agreement's reference to the Texas Business Corporation Act, but it was *PB-KBB and Preussag Oil & Gas,* not Preussag AG, that recited they were merging pursuant to that act. Preussag AG signed the agreement not as a principal, but as an indemnitor for pre-merger environmental liability of its former indirect subsidiary. In doing so, Preussag AG assumed liability related to a Texas merger; it did not avail itself of any privileges or benefits of doing business in Texas.

Each contract contained a choice-of-law clause, *but only for matters relating to those contracts.* A choice-of-law provision is a consideration. *See Burger King,* 471 U.S. at 482, 105 S.Ct. at 2187; *Project Eng'g USA Corp. v. Gator Hawk, Inc.,* 833 S.W.2d 716, 722 (Tex.App. – Houston [1st Dist.] 1992, no writ) (contract containing choice-of-law and choice-of-forum clauses). However, standing alone, it cannot suffice to confer jurisdiction. *See Burger King,* 471 U.S. at 482, 105 S.Ct. at 2187. Nor does it indicate a voluntary submission to the personal jurisdiction of the state's courts in the absence of any express understanding to that effect. *3-D Elec.,* 706 S.W.2d at 145 n. 9. Here, if these choice-of-law clauses showed voluntary submission at all, they showed it only for disputes arising from those two particular contracts.[16]

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[16] We realize the *Gator Hawk* court considered, in determining personal jurisdiction, a choice-of-law provision in

D. Preussag AG's Retention of a Houston Law Firm

Although the majority of the law firm's invoices were sent to or were for services for Preussag Oil & Gas, we must presume the trial judge found that a few of the firm's services were performed for Preussag AG. However, we conclude that these services do not amount to substantial or systematic and continuous contact with Texas. *Cf. Wilson v. Belin,* 20 F.3d 644, 650-51 (5th Cir.1994) (holding no general personal jurisdiction in a defamation suit despite nonresident's carrying legal malpractice insurance through a Texas law firm for less than a year, performing at least one legal project a year over three years for various Texas law firms, and being a pro bono consultant of a Texas historical society for several years). *Contrast Commonwealth of Puerto Rico v. SS ZOE COLOCOTRONI,* 628 F.2d 652, 667-68 (1st Cir.1980) (holding general personal jurisdiction existed over British insurers when (1) ships insured by them were involved, in the forum's waters, in numerous incidents giving rise to claims; (2) the insurers' local law firm, acting as the insurers' local correspondent, was instructed to take actions to forestall claims, to provide services for insured shipowners, or to prepare for litigation; and (3) the

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a contract that was not the subject of that suit, but we distinguish that case because (1) the contract also contained a choice-of-forum clause, (2) the defendant had more direct contacts with Texas than Preussag AG did, and (3) the defendant put on little proof to carry its burden. *See Project Eng'g USA Corp. v. Gator Hawk, Inc.*, 833 S.W.2d 716, 720-21 (Tex.App. – Houston [1st Dist.] 1992, no writ).

insurers advertised to their insured shipowners that the above services would be available through this law firm).

Additionally, some of the contacts with Vinson & Elkins are irrelevant because of when they took place. Federal authority indicates that contacts occurring after suit is filed are irrelevant because "district courts should examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances – up to and including the date the suit was filed – to assess whether they satisfy the 'continuous and systematic' standard." *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 569-70 (2nd Cir.1996); *see also Noonan v. Winston Co.*, 135 F.3d 85, 94-95 (1st Cir.1998); *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 n. 1 (5th Cir.1990); *Haas v. A.M. King Indus., Inc.*, 28 F.Supp.2d 644, 648 (D.Utah 1998). Some Texas authority implies that the relevant contacts are those up to the time of the injury. *See Scott v. Huey L. Cheramie, Inc.*, 833 S.W.2d 240, 242 (Tex.App. – Houston [14th Dist.] 1992, no writ); *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 45 (Tex.App. – Houston [14th Dist.] 1985), *writ ref'd n.r.e.*, 699 S.W.2d 199 (Tex.1985). Whether the cut-off date for determining general jurisdiction is the date of the injury or the date the suit is filed, the result is the same: the majority of the 16 items of correspondence between Preussag AG and Vinson & Elkins were generated after this suit's filing and are irrelevant to the jurisdictional inquiry. Similarly, a Vinson & Elkins's attorney's post-petition service on PNA's board is irrelevant and, in any event, would not show *Preussag AG's* purposeful availment of anything in Texas. Likewise, Preussag AG's post-petition promise to hold that attorney harmless in that position would be neither relevant nor, if relevant, "continuous and systematic."

E. Resolution

We hold that Preussag AG did not purposefully establish minimum contacts with Texas on a continuous and systematic basis. Therefore, we hold Texas courts have no jurisdiction over it. Because we conclude that no general personal jurisdiction exists over Preussag AG, we need not decide whether exercise of that jurisdiction would comport with notions of fair play and substantial justice. *See, e.g., Reyes v. Marine Drilling Cos.*, 944 S.W.2d 401, 405 (Tex.App. - Houston [14th Dist.] 1997, no writ).

VI. Conclusion

We reverse the order denying Preussag AG's special appearance and remand with instructions to dismiss Preussag AG for lack of personal jurisdiction.

APPENDIX D

NO. 94-C-1392

MARSHALL COLEMAN, ET AL	§ §	IN THE DISTRICT COURT OF
VS.	§ §	BRAZORIA COUNTY, TEXAS
ABB LUMMUS CREST, INC., ET AL	§ § §	23RD JUDICIAL DISTRICT

ORDER

(Filed Dec. 15, 1998)

On this 8th day of November, 1996, came on to be heard Preussag AG's Amended Special Appearance pursuant to Rule 120a of the Texas Rules of Civil Procedure. The Court, after reviewing the pleadings and exhibits on file, and after hearing argument of counsel, is of the opinion that said Special Appearance is without merit and should be DENIED. It is; therefore,

ORDERED, ADJUDGED AND DECREED that the Special Appearance of Defendant, Preussag AG, be and is hereby DENIED.

Signed and Entered this 15th day of December, 1998.

/s/ Ben Hardin
PRESIDING JUDGE

APPENDIX E

DAIMLER-BENZ AKTIENGESELLSCHAFT, Appellant,

v.

Scott OLSON, Individually and as Independent Executor of the Estate of Karen L. Olson, and Vickie Olson, Appellees.

No. 03-99-00114-CV.

Court of Appeals of Texas, Austin.

June 15, 2000.

Ruth G. Malinas, Ball & Weed, P.C., San Antonio, Bob E. Shannon, Baker & Botts, L.L.P., Austin, for appellant.

Richard P. Hogan, Hogan, Dubose & Townsend, L.L.P., Houston, Tommy Jacks, Mark Einfalt, Mithoff & Jacks, L.L.P., Austin, for appellees.

Before Justices JONES, KIDD and B.A. SMITH.

BEA ANN SMITH, Justice.

The opinion and judgment issued herein on March 23, 2000 are withdrawn, and the following opinion is substituted in lieu of the earlier one.

In this appeal, we consider the contacts with Texas of a foreign parent corporation that designs and manufactures cars abroad, but has established a North American subsidiary to import and distribute those cars in the United States, including Texas. Appellant Daimler-Benz Aktiengesellschaft (Daimler-Benz) brings an interlocutory appeal from the district court's order overruling its objection to personal jurisdiction. *See* Tex.R. Civ. P. 120a. The suit from which this appeal arises is a products liability action brought against Daimler-Benz by appellees Scott Olson, the son of the decedent, Karen Olson, and executor of her estate, and Vickie Olson, Karen's daughter. We will affirm the district court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Alleging that the Mercedes-Benz car Karen Olson was driving caught fire shortly after a van collided with it, causing Karen's death, the Olsons sued Daimler-Benz and the owner of the van, Central Produce Company of Temple, Texas. The accident occurred on April 3, 1995, in Temple, Texas. Scott and Vickie are Texas residents; the Mercedes-Benz Karen owned before her death was registered in Texas. The Olsons claimed that Daimler-Benz defectively designed and manufactured Karen's car, and that the defects caused her death. Daimler-Benz made a special appearance to challenge its amenability to suit in Texas. The district court overruled Daimler-Benz's objection, finding that jurisdiction over Daimler-Benz in Texas was proper.

Daimler-Benz is a German corporation with its principal place of business in Stuttgart, Germany. As shown in its annual reports, Daimler-Benz is a holding company with four corporate units: Mercedes-Benz, Daimler-Benz Industrie, Daimler-Benz Aerospace, and Daimler-Benz InterServices. These units, which comprehend all subsidiary corporations of Daimler-Benz, form the Daimler-Benz Group. The Mercedes-Benz corporate unit accounts for a preponderant share of Daimler-Benz's profit; in 1994, the Daimler-Benz Group earned profits of 0.9 billion deutsche marks, while the Mercedes-Benz unit returned 1.8 billion deutsche marks, its earnings being offset by losses in other corporate units.[1] The Mercedes-Benz unit contains both a passenger car division and a commercial vehicle division. In 1994, the Mercedes-Benz unit sold 592,400 passenger cars worldwide, 73,000 of these in the United States.

In 1995, the Daimler-Benz Group consisted of Daimler-Benz and its 319 domestic and foreign subsidiaries; in 1994, Daimler-Benz's subsidiaries numbered 357. Within the Mercedes-Benz corporate unit, subsidiaries apparently exist for every western European country, as well as for Brazil, Argentina, Nigeria, South Africa, Turkey, Iran, India, Japan, Indonesia, and Australia. In addition to establishing Mercedes-Benz of North America, Inc., Daimler-Benz has established Mercedes-Benz Canada, Inc., and Mercedes-Benz Mexico, S.A. de C.V.

Mercedes-Benz of North America, Inc. (MBNA) is the sole importer and distributor in the United States of Mercedes-Benz cars and parts. MBNA, a Delaware corporation with its principal place of business in Montvale, New Jersey, is a direct, wholly owned subsidiary of Daimler-Benz North America Corporation (DBNAC). DBNAC, also a Delaware corporation but with its principal place of business in New York City, is a direct, wholly owned subsidiary of Daimler-Benz.[2]

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[1] Daimler-Benz also reported its 1994 profits as 0.6 billion U.S. dollars. Using the same conversion rate, 1994 profits of the Mercedes-Benz unit would have been approximately $1.28 billion.

DISCUSSION

In two issues on appeal, Daimler-Benz contests the court's decision that Daimler-Benz is subject to the jurisdiction of Texas courts. A Texas court may exercise jurisdiction over a nonresident defendant if the Texas long-arm statute authorizes the exercise of jurisdiction and the exercise of jurisdiction comports with due process. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex.1991); *see* Tex. Civ. Prac. & Rem.Code Ann. § 17.042 (West 1997 & Supp.2000). The broad language of the long-arm statute permits an expansive reach, limited only by the federal constitutional requirements of due process. *Schlobohm v. Schapiro,* 784 S.W.2d 355, 357 (Tex.1990). As a result, we consider only whether it is consistent with federal due process for Texas courts to assert personal jurisdiction over Daimler-Benz. *Guardian Royal,* 815 S.W.2d at 226.

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[2] On July 1, 1989, Daimler-Benz transferred all of its motor vehicle business, as part of a business reorganization, to Mercedes-Benz Aktiengesellschaft. The transfer included all contractual rights and obligations relating to the automotive business, including distribution agreements. Mercedes-Benz Aktiengesellschaft was organized as a wholly owned subsidiary of Daimler-Benz, incorporated in Germany with its principal place of business in Stuttgart. On May 7, 1997, in a further business reorganization, Mercedes-Benz Aktiengesellschaft's rights and obligations were transferred back to Daimler-Benz. Mercedes-Benz Aktiengesellschaft then ceased to exist. In our discussion of Daimler-Benz's corporate organization and activities, we will treat the automotive business as if Daimler-Benz had always retained it.

In 1998, Daimler-Benz and Chrysler Corporation entered into a business combination resulting in the creation of DaimlerChrysler AG. Because this event occurred beyond the time-frame relevant to this appeal, we do not consider it in our analysis.

The federal due process clause protects a person's liberty interest in not being subject to binding judgments of a forum with which that person has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 471-72, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (citing *International Shoe Co. v. Washington,* 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Under the federal constitutional test of due process, a state may assert personal jurisdiction over a nonresident defendant only if the defendant has purposefully established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Id.* at 476, 105 S.Ct. 2174. The ultimate test of minimum contacts is whether the defendant purposefully availed itself of the privilege of conducting activities in Texas, thereby invoking the benefit and protection of Texas laws. *Schlobohm,* 784 S.W.2d at 357-58. This requirement ensures that a nonresident defendant will be haled into court only as a result of its intentional activities, so that it is reasonable for the nonresident defendant to expect the call of a Texas court. *Guardian Royal,* 815 S.W.2d at 226; *Schlobohm,* 784 S.W.2d at 357-58.

The minimum contacts analysis has been refined into two types of jurisdiction – general and specific. Specific jurisdiction exists when the cause of action arises out of or relates to the nonresident defendant's contacts with the forum state. *Guardian Royal,* 815 S.W.2d at 230. The defendant's activities must have been purposefully directed toward the forum state. *Id.* at 228. Under specific jurisdiction, the minimum contacts analysis focuses on the relationship among the defendant, the forum, and the litigation. *Id.*

General jurisdiction exists when the defendant's contacts with the forum state are continuous and systematic, even if the cause of action does not arise from or relate to activities conducted within Texas. *Id.* For general jurisdiction, the minimum contacts analysis is more demanding, requiring a showing of substantial activities within the forum state. *Schlobohm,* 784 S.W.2d at 357.

The existence of personal jurisdiction is a question of law, but proper exercise of that jurisdiction must sometimes be preceded by the resolution of underlying factual disputes. We determine the appropriateness of the trial court's resolution of those disputes by an ordinary sufficiency of the evidence review based on the entire record. *Conner v. ContiCarriers & Terminals, Inc.,* 944 S.W.2d 405, 411 (Tex.App. – Houston [14th Dist.] 1997, no writ). If the trial court's order is based on undisputed or otherwise established facts, we conduct a de novo review of the order. *Id.* A defendant who challenges a court's exercise of personal jurisdiction through a special appearance carries the burden of negating all bases of personal jurisdiction. *Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 203 (Tex.1985); *Siskind v. Villa Found. for Educ., Inc.,* 642 S.W.2d 434, 438 (Tex.1982); *Nikolai v. Strate,* 922 S.W.2d 229, 236 (Tex.App. – Fort Worth 1996, writ denied); *Hayes v. Wissel,* 882 S.W.2d 97, 99 (Tex.App. – Fort Worth 1994, no writ).

When a trial court overrules a special appearance, the defendant should request findings of fact under Texas Rule of Civil Procedure 296. *Runnells v. Firestone,* 746 S.W.2d 845, 849 (Tex.App. - Houston [14th Dist.]), *writ denied per curiam,* 760 S.W.2d 240 (Tex.1988). Because the trial court made no findings in this case, all facts necessary to support its judgment are implied. *Worford v. Stamper,* 801 S.W.2d 108, 109 (Tex.1990); *In re W.E.R.,* 669 S.W.2d 716, 716-17 (Tex.1984); *Runnells,* 746 S.W.2d at 848. When a complete reporter's record exists, however, these implied findings are not conclusive and an appellant may challenge the sufficiency of the evidence to support them. *Roberson v. Robinson,* 768 S.W.2d 280, 281 (Tex.1989). When such points are raised, the standard of review to be applied is the same as that to be applied in the review of jury findings or a trial court's findings of fact. *Id.*

Thus, we will set aside a finding of the trial court only if the finding is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951); *Runnells,* 746 S.W.2d at 849. In reviewing such a point of error, we must consider and weigh all of the evidence, both the evidence that tends to prove the existence of a vital fact as well as evidence that tends to disprove its existence. *Ames v. Ames,* 776 S.W.2d 154, 158-59 (Tex.1989); *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex.1986). So considering the evidence, if a finding is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the finding should be set aside, regardless whether some evidence supports it. *Watson v. Prewitt,* 159 Tex. 305, 320 S.W.2d 815, 816 (1959); *King's Estate,* 244 S.W.2d at 661.

If evidence supports the implied findings of fact, we must uphold the trial court's judgment on any legal theory supported by the findings. *Worford,* 801 S.W.2d at 109; *Point Lookout West, Inc. v. Whorton,* 742 S.W.2d 277, 278 (Tex.1987); *Runnells,* 746 S.W.2d at 848. This is so regardless of whether the trial court articulates the correct legal reason for the judgment. *Harrington v. Railroad Comm'n,* 375 S.W.2d 892, 895 (Tex.1964); *Fish v. Tandy Corp.,* 948 S.W.2d 886, 891-92 (Tex.App. - Fort Worth 1997, pet. denied); *Marifarms Oil & Gas, Inc. v. Westhoff,* 802 S.W.2d 123, 125 (Tex.App. - Fort Worth 1991, no writ). We review the legal conclusions supporting the judgment to determine whether they are correct as a matter of law. *Lawrence v. Kohl,* 853 S.W.2d 697, 699 (Tex.App. - Houston [1st Dist.] 1993, no writ).

AFFIDAVITS

Before the pretrial hearing on Daimler-Benz's objection to jurisdiction, the Olsons filed two affidavits in support of jurisdiction - the affidavits of Susan Tarver and Mark Einfalt. Daimler-Benz filed written objections to these affidavits at the conclusion of the hearing. After considering the objections, the trial court overruled them. We review the trial court's evidentiary rulings on Tarver's and Einfalt's affidavits for an abuse of discretion. *St. Paul Fire & Marine Ins. Co. v. Confer,* 956 S.W.2d 825, 831 (Tex.App. - San Antonio 1997, pet. denied). An abuse of discretion occurs when a court acts without reference to guiding rules or principles, or acts arbitrarily or unreasonably. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241 (Tex.1985).

The Olsons argue that Tarver's affidavit qualifies as a record of regularly conducted activity and is admissible under the business record exception to the rule against hearsay. *See* Tex.R. Evid. 803(6). The foundation for the business record exception has four requirements: (i) the record was made and kept in the course of regularly conducted business activity; (ii) it was the regular practice of the business activity to make the record; (iii) the record was made at or near the time of the event that it records; and (iv) the record was made by, or from information transmitted by, a person with knowledge; the person with knowledge must have acted in the regular course of business, or as it is sometimes put, must have had a business duty to report. *See* Steven Goode, Olin Guy Wellborn III, & M. Michael Sharlot, *Courtroom Handbook on Texas Evidence,* Authors' Commentary 407-08 (1994).

Tarver is the west coast manager of Port Import Export Reporting Service (PIERS), a division of *The Journal of Commerce.* PIERS operates a database that tracks all imports and exports transacted through U.S. ports. The Freedom of Information Act in conjunction with the U.S. Customs regulations authorizes press organizations to copy certain official shipping documents, such as manifests and bills of lading, and make them available to the public. The 125 reporters mentioned in Tarver's affidavit collect import and export information from all U.S. ports as contained on bills of lading, vessel manifests, and other official shipping documents submitted by steamship companies to the U.S. Customs Service. Additionally, PIERS has access to U.S. Customs' Automated Manifest System data tapes. These official shipping documents are made at or near the time by (or from information transmitted by) a person with knowledge and are kept in the course of regularly conducted shipping activity. It is the regular practice of the shipping industry, as required by federal law, to keep such records and information. Further, after collecting the data from these sources, the staff of PIERS regularly verifies that the information in its database is accurate. The trial court did not abuse its discretion in finding that Tarver's affidavit satisfies the foundational requirements of the business records exception.

Additionally, publications of market prices or statistical compilations that are proven to be generally recognized as reliable and regularly used in a trade or specialized activity by persons so engaged are admissible for the truth of the matter published. Tex.R. Evid. 803(17); *Curran v. Unis,* 711 S.W.2d 290, 296-97 (Tex.App. – Dallas 1986, no writ) (citing *Lewis v. Southmore Savs. Ass'n,* 480 S.W.2d 180, 186 (Tex.1972)). Tarver testified that the information in the PIERS database is relied upon by the public, U.S. Customs Service, U.S. Trade Development Offices, and other U.S. agencies, in addition to commercial offices of foreign governments, commercial banks and currency dealers, port authorities, consultants, equipment manufacturers, freight forwarders, importers and exporters, law firms, and manufacturers. PIERS information is regarded by these governmental agencies and private entities as accurate and reliable in the same way as reports of interest rates posted in *The Wall Street Journal.* The exception to the hearsay rule for published compilations generally used and relied on by persons in particular occupations also supports the admission of Tarver's affidavit.

Mark Einfalt's affidavit contains as attachments pleadings and discovery submitted in this case, Daimler-Benz's and DBNAC's annual shareholder reports from 1990 through 1995, information from the web sites of Daimler-Benz, DBNAC, and MBNA, and several commercial reports. Daimler-Benz argues that the attachments are not properly identified and authenticated. Einfalt averred that, within his personal knowledge, the attachments are accurate copies of the original documents; Einfalt then identified the attachments. This testimony properly authenticates the attachments. Tex.R. Evid. 901(b)(1). Daimler-Benz's argument that documents printed from web sites must be authenticated by testimony establishing the system from which the printouts were obtained and the accuracy of the printouts was not presented to the trial court, and we do not consider it. Tex.R.App. P. 33.1(a).

Daimler-Benz also states globally that the commercial reports and web site documents attached to Einfalt's affidavit constitute hearsay. Assuming the trial court erroneously admitted these documents, however, Daimler-Benz fails to explain how their admission probably caused the rendition of an improper judgment. *See id.* 44.1(a). In addition, Daimler-Benz offers no argument that distinguishes among these documents. The documents showing their source as Daimler-Benz's web site, for instance, merit a different analysis than those labeled as commercial reports. Daimler-Benz's contention is too general to require us to search for error. We therefore decline to hold that the trial court abused its discretion in admitting Einfalt's affidavit and its attachments.

PERSONAL JURISDICTION

Minimum Contacts

Daimler-Benz contends that it lacked the systematic and continuous contacts with Texas required to confer general jurisdiction on Texas courts. We will examine the record for evidence of Daimler-Benz's activities in 1996, when the Olsons filed suit, and for a reasonable time before 1996. Our review will include evidence of Daimler-Benz's allegations in a federal lawsuit, the corporate structure of Daimler-Benz, its distribution agreement with MBNA, and its Internet web site.

Daimler-Benz presented evidence that it has never been authorized to do business and has never done business in Texas, has no officers, agents, or employees in Texas, does not own or possess any office, plant, or warehouse in Texas, and has no equipment, inventory, or books and records in Texas. Further, Daimler-Benz offered evidence that it has no mailing address, telephone listing, bank account, or other real or personal property in Texas. It has never appointed an agent for service of process in Texas and has never sold Mercedes-Benz cars in the U.S.

Daimler-Benz and the Olsons stipulated to certain facts in the trial court. They agreed that MBNA buys U.S.-version Mercedes-Benz vehicles in Germany from Daimler-Benz. MBNA ships those vehicles to U.S. ports of entry and then to various vehicle preparation centers, which MBNA owns or leases and operates. MBNA also ships parts it has bought from Daimler-Benz in Germany to U.S. ports of entry and then to parts distribution centers, which MBNA owns or leases and operates. Daimler-Benz and MBNA have executed a distribution agreement, which grants MBNA the exclusive right to import and distribute U.S.-version Mercedes-Benz passenger cars and parts for the U.S. The agreement also licenses MBNA to use certain Daimler-Benz trademarks. Daimler-Benz designs and manufactures U.S.-version Mercedes-Benz vehicles to comply with applicable federal and state regulations so that they can be certified as compliant and sold to MBNA in Germany for marketing and distribution by MBNA in the U.S., including the state of Texas. Vehicles not intended for sale to MBNA are not necessarily so designed, manufactured, or certified.

The parties also agreed that the 1980 Mercedes-Benz 500SE Karen Olson was driving when the collision occurred was not a U.S.-version vehicle. The car was first sold to a customer in Stuttgart, Germany; neither Daimler-Benz nor any of its subsidiaries played any role in importing the car to the U.S. The car was designed and manufactured by Daimler-Benz in Germany for the European marketplace; it was not designed for the U.S., was not sold to a Daimler-Benz subsidiary for export to the U.S., and was not marketed in or placed by Daimler-Benz in a stream of commerce destined for the U.S. Daimler-Benz does, however, design, manufacture, and sell vehicles in a stream of commerce intended for the U.S. market, including the state of Texas.

Further, the parties stipulated that Daimler-Benz has never advertised the sale of Mercedes-Benz vehicles in

Texas; rather, MBNA and its local, authorized dealers advertise U.S.-version Mercedes-Benz vehicles for sale in Texas. Neither entity advertises the sale of non-U.S.-version Mercedes-Benz vehicles in Texas.

The parties' stipulations amount to judicial admissions, which normally are conclusive on the party making them. *See Mendoza v. Fidelity & Guar. Ins. Underwriters, Inc.,* 606 S.W.2d 692, 694 (Tex.1980). Although evidence controverting an admission is barred, a party relying on the admission must protect the record by objecting to the introduction of controverting evidence. *Marshall v. Vise,* 767 S.W.2d 699, 700 (Tex.1989); *Houston First Am. Savs. v. Musick,* 650 S.W.2d 764, 769 (Tex.1983). In this case, the Olsons submitted as evidence before the trial court the petition filed by Daimler-Benz and MBNA in 1998 in a Texas federal district court. *See Daimler-Benz Aktiengesellschaft v. Moghimi,* No. 3-98 Civ. 1308-H (N.D.Tex. Aug. 18, 1998).[3] Pleadings in another case that are inconsistent with a party's position in a present action are quasi-admissions, which are treated as some evidence. *DowElanco v. Benitez,* 4 S.W.3d 866, 871 (Tex.App. – Corpus Christi 1999, no pet. h.). We will set out the relevant allegations Daimler-Benz made in its petition in federal court before addressing the inconsistencies.

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[3] Although Daimler-Benz and MBNA filed the petition in *Moghimi* in 1998, their allegations cover activities that occurred during the time relevant to our analysis, 1996 and a reasonable time beforehand.

1. Daimler-Benz's Federal-Court Petition

In its federal-court petition, Daimler-Benz and MBNA sued Ray Moghimi, a car dealer in Dallas, for unlawfully using federally registered trademarks and service marks. Daimler-Benz stated in the petition that it owned, and had registered in the United States Patent and Trademark Office, the famous trademarks and service marks Mercedes-Benz and the design of a three-pointed star. Daimler-Benz alleged that it had continuously, over many decades, used its trademarks and service marks throughout the state of Texas to identify and distinguish its cars, parts, accessories, and related products, as well as the maintenance and repair services furnished by its licensed dealers. Numerous Mercedes-Benz cars, parts, and accessories, and extensive maintenance and repair services, have been advertised and furnished under these marks by authorized dealers in Texas. Daimler-Benz and MBNA have spent large sums of money to use, promote, and advertise the trademarks and service marks in commerce, with the result that the marks have attained "extraordinary fame and inestimable good will" and now rank among the most distinctive marks in Texas. Because of their long and extensive use, Daimler-Benz and MBNA's marks have become recognized by the public as identifying Daimler-Benz and MBNA and the quality cars, parts, accessories, and services sold by them and their authorized dealers. The excellence of these products and services has earned Daimler-Benz and MBNA "a valuable reputation and tremendous goodwill" with the public, symbolized by the trademarks and service marks. Daimler-Benz and MBNA alleged that by unlawfully using the trademarks and service marks, Moghimi had engaged in unfair competition, had intended to injure their business operations, and had injured their business reputation and interfered with their advantageous business relationships.

The allegations of the petition conflict with the parties' stipulations as to Daimler-Benz's advertising: while the parties stipulated that Daimler-Benz itself has never advertised Mercedes-Benz vehicles in Texas, Daimler-Benz pleaded in federal court that it had spent large sums of money to advertise its trademarks and service marks, with the result that its marks had attained inestimable good will and now ranked among the most distinctive in Texas. Because Daimler-Benz failed to object to the controverting statement on the ground that it was relying on the stipulation, it has waived its right to rely on the stipulation. *Marshall*, 767 S.W.2d at 700. The controverted stipulation as to advertising is thereby reduced to the status of a quasi-admission, which is not conclusive, but is merely some evidence for the fact finder to consider. *See Mendoza*, 606 S.W.2d at 694. The allegations in the federal-court petition as to advertising, being likewise controverted, also remain quasi-admissions. *DowElanco*, 4 S.W.3d at 871.

2. Judicial Admissions

The remaining allegations in Daimler-Benz's petition in federal court, summarized, are that Daimler-Benz owned and had registered in this country certain trademarks and service marks; that Daimler-Benz had long used its marks throughout Texas to identify its cars; that this long and extensive use had caused the public to recognize the marks as identifying Daimler-Benz and the cars it sold; that the excellence of the cars had earned Daimler-Benz a valuable reputation and tremendous goodwill, which were symbolized by its marks; and that the unlawful use of its marks constituted unfair competition, was intended to injure Daimler-Benz's business operations, and had injured its business reputation and interfered with its business relationships. As stated, pleadings in another case that are inconsistent with a party's position in a present action are quasi-admissions. *Id.* If certain conditions are met, however, quasi-admissions can rise to the level of formal judicial admissions. *Mendoza,* 606 S.W.2d at 694; *DowElanco,* 4 S.W.3d at 871. The policy underlying this rule is that it would be unjust to allow a party to recover after it has negated its right to recover by clear, unequivocal evidence. *Mendoza,* 606 S.W.2d at 694; *DowElanco,* 4 S.W.3d at 871.

To be treated as judicial admissions, quasi-admissions must meet five criteria: (1) the statements relied on were made during the course of a judicial proceeding; (2) the statements are contrary to an essential fact embraced in the theory of recovery or defense asserted by the person making the statements; (3) the statements were deliberate, clear, and unequivocal; (4) giving conclusive effect to the statements will be consistent with the policy on which the rule is based; and (5) the statements are not also destructive of the opposing party's theory of recovery. *Mendoza,* 606 S.W.2d at 694; *United States Fidelity & Guar. Co. v. Carr,* 242 S.W.2d 224, 229 (Tex.Civ.App. – San Antonio 1951, writ ref'd).

The statements we have summarized were made in a judicial proceeding, are contrary to Daimler-Benz's assertion here that it lacks contacts with Texas, and are not destructive of the Olsons' theory of recovery. Further, the statements deliberately and unequivocally recount Daimler-Benz's activities in propagating its trademarks and service marks throughout Texas. Giving conclusive effect to these statements is consistent with the policy that a party should not be allowed to prevail on its assertions after clearly negating those assertions before a judicial tribunal. Because the allegations in Daimler-Benz's federal-court petition meet the requirements for being considered judicial admissions, Daimler-Benz is bound by those allegations in this suit.[4] We therefore consider it established that Daimler-Benz's long and extensive use in Texas of its trademarks and service marks has caused the public to identify the marks with Daimler-Benz and the cars it produces. The excellence of its cars has earned Daimler-Benz a valuable reputation with the public, which is also symbolized by its marks. It is necessarily implied from Daimler-Benz's allegations that it has engaged in competition and has established business relationships and business operations in Texas. *See Hutcherson v. Sovereign Camp, W.O.W.*, 112 Tex. 551,

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[4] Daimler-Benz stated in the federal-court petition that the public recognizes its marks as identifying it and MBNA "and the automobiles, parts, accessories and maintenance, repair and related services sold and furnished by [Daimler-Benz and MBNA] and their authorized dealers." Because Daimler-Benz did not allege that it sold cars directly to U.S. buyers, we do not consider this allegation to contradict the system of distribution stipulated to by the parties.

251 S.W. 491, 492 (1923) (trial court may find inferential facts that, as matter of law, are necessarily inferred from facts judicially admitted); *Davis v. State,* 904 S.W.2d 946, 950-51 (Tex.App. – Austin 1995, no writ). Thus, the allegations show that Daimler-Benz used its marks in Texas to create recognition for itself as part of a system of marketing its vehicles in Texas. Daimler-Benz established business operations in Texas and competed in the Texas marketplace for vehicle sales. Daimler-Benz's marketing system, which also involved its subsidiary MBNA and numerous dealerships, had economic value, which Daimler-Benz acted to protect by resort to the judicial system.

3. Alter Ego

Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there. But if the parent corporation exerts such dominance and control over its subsidiary that the subsidiary is simply a conduit through which the parent conducts its business, the parent may be considered to be doing business through the local activities of its subsidiaries. *Jones v. Beech Aircraft,* 995 S.W.2d 767, 771 (Tex.App. – San Antonio 1999, pet. dism'd w.o.j.); *Moffett v. Goodyear Tire & Rubber Co.,* 652 S.W.2d 609, 613 (Tex.App. – Austin 1983, writ ref'd n.r.e.). The degree of control exercised by the parent must be greater than that normally associated with common ownership and directorship. *Conner,* 944 S.W.2d at 419.

Courts must examine all relevant circumstances to determine whether the parent and subsidiary should be considered separate or joined; a variety of factors have guided courts in making this determination: whether distinct and adequately capitalized financial units are incorporated and maintained; whether daily operations of the two corporations are separate; whether formal barriers between the management of the two entities are erected, with each functioning in its own best interest; whether the two file consolidated tax returns; whether operating capital is financed by the parent or borrowed from other sources; whether the subsidiary's stock is owned by the parent; whether the two share common officers and directors; the extent to which separate books and accounts are kept; whether both have common departments of businesses; whether they have separate meetings of shareholders and directors; whether an officer or director of the one corporation is permitted to determine the policies of the other; whether those with whom the corporation comes into contact are apprised of their separate identity; and the extent to which contracts between the parent and subsidiary favor one over the other. *Conner,* 944 S.W.2d at 419; *Moffett,* 652 S.W.2d at 613. The Olsons bore the burden of proving the type of close relationship that would enable the court to disregard the separate corporate structures. *Jones,* 995 S.W.2d at 771.

Not all of the above factors need be present or considered. In *Jones,* the court of appeals analyzed the relationship between a parent corporation and its two subsidiaries and focused on several factors indicating that the corporations should be considered as one for purposes of personal jurisdiction: the corporations shared common ownership, officers, and directors; the parent exercised control over the daily operations of the subsidiaries; and the clients of the subsidiaries were not apprised of the separate identity of each entity. 995 S.W.2d at 772-73. Additionally, the court described one subsidiary as existing solely to funnel sales to the parent and the other as directing customers to the parent for sales. *Id.* at 772.[5]

a. *Corporate Structure and Inter-Corporate Relations*

Daimler-Benz submitted evidence that it and MBNA have separate officers and directors and that the two corporations have always formally maintained their separate corporate existences. Daimler-Benz has always kept its books, records, tax returns, and financial statements separate from those of MBNA. All real and personal property that MBNA uses or controls has been owned by it or leased by it from parties other than Daimler-Benz.

Undisputed evidence in the record shows that MBNA does business in Texas. The parties stipulated that MBNA is qualified to do business in Texas. As mentioned above, the parties stipulated that MBNA advertises U.S.-version Mercedes-Benz cars for sale in Texas; MBNA's advertising appears in publications and newspapers directed to Texas and is broadcast over television and radio stations throughout Texas. The evidence shows that MBNA, as the exclusive U.S. distributor of Mercedes-Benz cars, selects its Mercedes-Benz dealers and forms contractual relationships with them. MBNA also supervises the performance of the dealers, has authority to terminate dealers, and handles the detailed accounting and recordkeeping associated with the dealers. MBNA's dealer network extends throughout the U.S., including the state of Texas. The parties agreed that up until 1995, MBNA shipped Mercedes-Benz cars from Germany to the Houston Port Authority, from which point the cars were transported to a vehicle preparation center near Houston. Documents admitted in evidence show that from 1987 through 1990, MBNA imported more than 18,400 Mercedes-Benz vehicles into Texas through the Port of Houston. In 1995, 40,609 Mercedes-Benz vehicles from model years 1985 through 1995 were in operation in Texas. To the extent Daimler-Benz disputes that MBNA does business in Texas, MBNA's pleadings as co-plaintiff in *Moghimi* constitute an admission that MBNA competes in the Texas marketplace and has established business relationships, a business reputation, and business operations in Texas. Following our analysis above, we consider these admissions to be judicial admissions.

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[5] Although many of the factors relevant to our analysis may also be relevant in determining whether a parent corporation should be liable for the actions of its subsidiary, the determination whether two corporate entities are one and the same for jurisdictional purposes is distinct. *See Jones*, 995 S.W.2d at 771; *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir.1983); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 425 (9th Cir.1977). The operative question here is whether MBNA is in fact a mere "division" or "branch" of a larger whole, such that MBNA's contacts with Texas should be attributed to Daimler-Benz. *See Wells Fargo & Co.*, 556 F.2d at 425.

The Olsons submitted in evidence Daimler-Benz's annual shareholder reports for the years 1990 to 1995. These show that financing for companies within the Daimler-Benz Group is handled by Daimler-Benz and its regional finance companies; the finance companies procure funds on national and international markets and pass the funds on to the operating companies. Daimler-Benz also arranges at least some aspects of purchasing for its operating companies.

In the section of Daimler-Benz's 1992 through 1994 annual shareholder reports titled, "The Corporate Principles of Daimler-Benz," Daimler-Benz described itself as an international company and wrote, "Daimler-Benz does business in all corners of the globe." In a speech given in October 1997, the chairman and chief executive officer of MBNA described MBNA as "the organization that links our parent company in Germany and our 320 dealers across the United States." Daimler-Benz considers the U.S. to be its largest foreign market. In Daimler-Benz's annual shareholder reports from 1990 through 1995, management's business review consistently discussed sales of Mercedes-Benz cars in the U.S. in terms of "our" sales and the number of cars "we" sold.

The financial statements are presented primarily on a consolidated basis for the entire Daimler-Benz Group, although certain figures are reported separately for Daimler-Benz. This format was adopted in the 1992 report, when the chairman of Daimler-Benz's board of management stated that the company would concentrate on the consolidated financial statements, rather than Daimler-Benz's individual performance, to reflect the growing internationalization of the company. Notes to the consolidated financial statements in the 1992 report say that profits earned by subsidiaries of Daimler-Benz are added to consolidated retained earnings.

Although Daimler-Benz and MBNA do not appear to be managed by the same individuals, Daimler-Benz describes itself as the "managing holding company" of the Daimler-Benz Group, and one member of Daimler-Benz's Board of Management is shown in the 1994 shareholder report as being responsible for Daimler-Benz's subsidiaries. The companies within the Daimler-Benz Group contribute remuneration each year to the members of Daimler-Benz's Board of Management. Among its principal subsidiaries, Daimler-Benz classifies MBNA as a sales company, rather than a finance, manufacturing, holding, or service company. Although not mentioning MBNA specifically, Daimler-Benz related in its 1993 shareholder report that in the context of subsidiary administration, it followed and assessed ongoing projects of subsidiary companies and drafted decisions for the "internal bodies."

As discussed more fully below, Daimler-Benz requires MBNA to display Daimler-Benz's trademarks, including its three-pointed star. This well-known trademark, valuable to Daimler-Benz in promoting sales of its cars, does not allow customers to distinguish Daimler-Benz from its subsidiary MBNA or the numerous authorized dealers in Texas.

Our review of this evidence shows Daimler-Benz as a company devoted to selling its cars worldwide, including in Texas. To achieve this goal, Daimler-Benz has established subsidiaries in important markets around the globe. Although Daimler-Benz strictly observes corporate formalities, MBNA essentially connects Daimler-Benz to markets in the U.S., including Texas. Daimler-Benz holds itself out to investors as a corporation that does business in all corners of the globe. MBNA's classification as a sales company demonstrates that its function is to generate sales for Daimler-Benz. The confusion of identity created by MBNA's use of Daimler-Benz's three-pointed star is some evidence that Daimler-Benz is doing business through MBNA. Daimler-Benz also exercises significant functions for MBNA and its other subsidiaries, such as obtaining financing and coordinating purchasing. Further, the management of Daimler-Benz closely supervises and directs the activities of its subsidiaries. Thus, while formally separate, Daimler-Benz and MBNA form a functional whole in promoting and marketing vehicles in Texas.

b. *Distribution Agreement*

The distribution agreement in effect between Daimler-Benz and MBNA at the time of Karen Olson's accident was submitted to the trial court as an attachment to the parties' stipulations. As a part of the parties' stipulations, the agreement carries the weight of a judicial admission. By means of the distribution agreement, Daimler-Benz conferred on MBNA the exclusive right to distribute within the U.S. passenger cars and parts manufactured by Daimler-Benz for the U.S. market. The agreement obligates MBNA to strive for maximum imports and sales of Mercedes-Benz vehicles. The agreement also gives Daimler-Benz the right, in a number of situations, to determine the details of MBNA's daily operations. Under the agreement, MBNA must inform Daimler-Benz of the prices it charges buyers and dealers, and on Daimler-Benz's request, MBNA must determine its sales prices in consultation with Daimler-Benz. To maximize imports and sales, Daimler-Benz has the right to determine, together with MBNA, purchase figures and planning schedules; if the parties cannot agree, the figures determined by Daimler-Benz apply. If the parties cannot agree on the minimum quantity of vehicles MBNA must keep in stock, Daimler-Benz can determine the minimum quantity. Likewise, in the absence of agreement, Daimler-Benz determines the number and assortment of demonstration vehicles MBNA must keep in stock. When MBNA performs warranty work, it must submit the warranty claim to Daimler-Benz and keep the parts that have been replaced. Daimler-Benz is entitled to examine the claim and the parts to determine whether the claim was justified. MBNA must report regularly to Daimler-Benz on all advertising and sales promotions it and its dealers adopt and must report on their results, including a statement of expenditures and copies of the sales materials. Daimler-Benz may pass on to other general distributors any sales and promotional materials remitted by MBNA. Daimler-Benz reserves the right under the agreement to demand that MBNA discontinue or alter its advertising and canvassing activities. If MBNA is unable to conclude a transaction, it must inform Daimler-Benz so that Daimler-Benz can help with the transaction. MBNA must submit its annual balance sheet and earnings statement to Daimler-Benz so that Daimler-Benz can advise MBNA on business management. Daimler-Benz can at any time send a representative to the U.S., whom MBNA must help to carry out his assignment, in particular by supplying information and permitting records to be inspected. Daimler-Benz must agree to the design of all documents bearing MBNA's name.

The distribution agreement also authorizes Daimler-Benz to impose its standards on MBNA throughout MBNA's management and operations. The stock of vehicles that MBNA agrees to maintain must be organized according to Daimler-Benz's principles. MBNA must maintain showrooms that are "commensurate with the prestige of" Daimler-Benz. MBNA is to organize its sales network to conform with Daimler-Benz's standards relating to the size and equipping of sales premises, work organization and planning systems, and the use of data processing systems recommended by Daimler-Benz. MBNA is responsible for training its personnel in sales, service, parts systems, and business management and organization to conform with Daimler-Benz's standards. MBNA also agrees to provide servicing, maintenance and repair work for Mercedes-Benz vehicles in conformance with Daimler-Benz's standards. As part of its servicing obligations, MBNA agrees to carry out warranty work on vehicles and parts supplied by Daimler-Benz in accordance with Daimler-Benz's directives. MBNA must perform warranty work on vehicles irrespective of where they were sold, including foreign versions of Daimler-Benz's vehicles, and must process warranty claims according to the instructions set out in Daimler-Benz's manual for warranty procedure. All workshops used to provide service to customer vehicles must meet Daimler-Benz's standards regarding size, personnel, equipment, and organization. MBNA is to impose the same obligations accepted by it under the agreement on all authorized workshops, service stations, and other workshops with which it enters dealer agreements. Finally, MBNA must observe Daimler-Benz's directives in carrying out its advertising and canvassing activities.

The agreement expressly provides that it is in the common interest of Daimler-Benz and MBNA to establish a corporate identity for the dealer network worldwide. To further this corporate identity, MBNA must observe Daimler-Benz's directives in designing its interior and exterior premises, its outdoor advertising, and its stationery. In pursuing its activities under the agreement, MBNA has the duty to use Daimler-Benz's names, trademarks, and service marks, subject to Daimler-Benz's approval of the manner of this use. The agreement also requires MBNA to develop its market territory systematically and obligates MBNA to spare no effort to sell Daimler-Benz's vehicles and "to represent directly and indirectly the interests of" Daimler-Benz. The agreement disclaims an agency relationship between Daimler-Benz and MBNA, stating that the relationship between the parties is that of vendor-vendee and that MBNA has no right to bind Daimler-Benz in any manner without Daimler-Benz's written consent.

The terms of the agreement we have set forth directly align MBNA's interests with Daimler-Benz's interest in maximizing the sales of its vehicles in the U.S. The agreement specifically authorizes MBNA to represent, "directly and indirectly," Daimler-Benz's interests in the United States and requires MBNA to further those interests. As detailed above, the agreement gives Daimler-Benz extensive control over the details of MBNA's management and operations.

In contrast to the distribution agreement, the parties stipulated that MBNA is a separately operated subsidiary of Daimler-Benz. Daimler-Benz also submitted evidence that Daimler-Benz has never participated in the day-to-day conduct of MBNA's business and that, once it has sold cars and parts to MBNA in Germany, Daimler-Benz exercises no control over MBNA in its subsequent sales. Granting that this evidence conflicts with the distribution agreement, we will consider the distribution agreement not as conclusive evidence, but as some evidence to be weighed with other evidence in the record. Nevertheless, considering the distribution agreement with the evidence of Daimler-Benz's corporate structure, we believe that it is proper to view Daimler-Benz as doing business in Texas through the activities of MBNA.

4. Internet Web Site with E-mail

The parties stipulated that Daimler-Benz maintains an Internet web site by means of which individuals around the world, including those in Texas, can communicate with it electronically. The web site offers Internet users information about Daimler-Benz and its worldwide products and services. On one subdirectory entitled "Mailing Service," Texas residents can register with Daimler-Benz to receive direct mailings from Daimler-Benz electronically. Another subdirectory allows Texas residents to communicate with and request replies from Daimler-Benz representatives. Daimler-Benz does not offer Mercedes-Benz vehicles for sale to Texas residents over the Internet, but refers sales inquiries from the U.S. to MBNA. MBNA maintains an independent web site on which it advertises U.S.-version Mercedes-Benz vehicles available for sale at authorized dealers throughout the U.S., including Texas.

In Texas, the continuum of Internet activities is divided into three categories for purposes of personal jurisdiction. At one end of the scale, defendants who make contracts with residents of other jurisdictions that involve the knowing and repeated transmission of computer files electronically do business over the Internet. *Jones,* 995 S.W.2d at 772. At the other end of the scale, defendants who establish passive web sites that do no more than make information available to Internet users do not provide grounds for personal jurisdiction. *Id.* In between lie interactive web sites, which allow users to exchange information with a host computer, communicating with the person or company that runs the web site. In these cases, the exercise of jurisdiction depends on the level of interactivity between the parties on the web site. *Id.*

The web site Daimler-Benz maintains is interactive, allowing Texas residents to submit comments and questions to Daimler-Benz representatives and to receive electronic mailings from Daimler-Benz. Daimler-Benz, however, makes no sales or other contracts through its Internet web site. While this level of interactivity standing alone might not be enough to subject Daimler-Benz to jurisdiction in Texas, we will consider it a factor, along with the other contacts that exist in this case.[6]

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[6] Although the parties' stipulations as to Daimler-Benz's web site are stated in the present tense and appear to have been

The evidence as a whole shows that Daimler-Benz advertises its cars in Texas, that MBNA functions essentially as an exclusive sales conduit for Daimler-Benz, and that Daimler-Benz solicits communication from Texas residents through its web site. It is conclusively established that Daimler-Benz has business operations and relationships in Texas and that it competes in the Texas marketplace. Implied findings in these respects support the legal conclusion that Daimler-Benz has engaged in systematic and continuous contacts with Texas. Because we have determined that Daimler-Benz is subject to general jurisdiction, we need not consider whether specific jurisdiction exists.

Fair Play and Substantial Justice

Finally, Daimler-Benz argues that, under the second prong of the due process test, the exercise of jurisdiction by a Texas court fails to comport with traditional notions of fair play and substantial justice. *Guardian Royal,* 815 S.W.2d at 228. In deciding this issue, we consider the following factors: (1) the burden on the defendant, (2) the

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made in 1998, other evidence shows that the web site existed in 1996. In its 1995 annual report, Daimler-Benz stated that it had improved its customer interaction system for use on the World Wide Web; Daimler-Benz's customer interaction system allowed customers to choose a model, color, and options to compose their ideal car on a personal computer screen. The advanced features available on Daimler-Benz's web site in 1998, such as live coverage of the shareholders' meeting, a history game visitors could play for prizes, a guest book, and an order service, make it reasonable to infer that the interactive features described in the parties' stipulations existed in 1996.

interests of the forum state in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. When the defendant is a resident of another nation, the court must also consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a state court as well as the federal government's interest in its foreign relations policies. *Id.* at 229.

In this case, Daimler-Benz's significant business contacts with Texas lessen the burden on it to defend the suit in Texas. Daimler-Benz itself has already initiated litigation in a Texas court, showing that it is capable of pursuing its legal interests in Texas and is not unfamiliar with Texas jurisprudence. Texas's interest in protecting its citizens from defective cars that cause injury and death within its territory is strong. The Olsons have also sued the company owning the van that collided with Karen, and Texas undisputedly has jurisdiction over this company. The most convenient and efficient way to resolve the entire controversy is to allow the Olsons to proceed against Daimler-Benz in the same suit in Texas. Thus, the Olsons' interest in obtaining convenient and efficient relief also weighs in favor of jurisdiction in Texas.

The evidence shows that Daimler-Benz places a large volume of vehicles into a stream of commerce destined for the United States and that Daimler-Benz's stock is traded on the New York Stock Exchange. The federal government's foreign policy interests are not hindered when individual states ensure that large international companies operate in an equitable business environment in which wrongs are redressed by those responsible. The parties also stipulated that Daimler-Benz maintains general liability insurance, including products liability insurance, covering claims made against it worldwide. Such protection being consonant with business policies in Germany, to allow recovery on such insurance following a judicial determination of liability would not appear to violate Germany's policies. We conclude that the assertion of personal jurisdiction by the district court comports with traditional notions of fair play and substantial justice.

CONCLUSION

Having determined that Daimler-Benz has established minimum contacts with Texas and that the assertion of jurisdiction comports with fair play and substantial justice, we overrule Daimler-Benz's two issues. We affirm the order of the district court.

APPENDIX F

Identity of Parties in the Texas Supreme Court
S.Ct. Rule 14(b)

The names of all of the parties in the Texas Supreme Court are as follows:

DEFENDANT/RESPONDENT:
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SHORT, JAMES SILVESTER, KIPPY SMITH, JAMES E TAYLOR, HOWARD TURNER, JAMES MCCOURT, VICTOR SILVESTER, MICHAEL BATES, FREDERICK EARL FOWLER, THOMAS L. BRADLEY, RICHARD ALLEN BLACKWELL, RACHEL ROBINSON, SHANE ALAN MILLER, STEVEN ANDREW SCHOR, ROY SMITH REPASKY, ANGELA L. JOHNSON, JOHN D. ELLIS, MICHAEL CHARLIE SMART, CHRISTOPHER D. DAUER, DAWN MARA HERSHKOWITZ, MICHAEL D. PINDELL, ALFRED GUADALUPE RODRIGUEZ, GORDON LEE MCCOURT, JR., HAROLD WAYNE RHODES, ROBERT STEPHEN BENNETT, EUGENE VAUGHN GILL, JR., JERONIMO JERRY SOLIZ, WALLACE H. GEARY, JR., JOSE MIGUEL GUTIERREZ, PHILLIP BAXTER IVEY, ERIC NEWTON SPEAR, MICHAEL STANLEY ADAMS, JAMES ROBERT HAITHCOX, JESUS (JESSE) C. PEREZ, RICHARD HERBERT HENKLE, LARRY THOMAS BIRKNER, JAMES W. FRAZEE, JR., ELIZABETH ANN GRIFFITHS, KEITH LEGNON DOTY, MANUEL R. SEGOVIA, ROBERT CLINTON OLENDER, ANTON ZUKIC, ROBERT GEORGE LARRISEY, BEVERLY JANE POLLOCK, CATHERINE G. ROSANKY, WILLIE JOE HICKS, DANIEL DALE BROWN, STANLEY EARL SMITH, IVAN HAROLD WILLIAMSON, JONATHAN EARL WEATHERBY RHONDA L. MANTEY, JOHN R. MANTEY, MICHELLE STEPHENS, PAUL EDWARD DOUGHARTY, JOHN B. OLIVO, TIMOTHY MICHAEL NEUSBORN, RAMIRO TREVINO, REYNALDO TIJERINA, JR., SHEDRICK ONEAL CALLAWAY, MICHAEL CHARLES LAND, LARRY CLIFTON PERRY, CANDY SWEET LOVETT, JOHN ROBERT GREEN, III, TRACEY RAY MANCHESTER, JESSIE W. ZIEGLER, ANGELA TAYLOR ZIEGLER, JESSE W. ZIEGLER and ANGELA TAYLOR ZIEGLER on behalf of ORIANA JESTINE ZIEGLER, A MINOR, RANDY ALLEN HICKS, BILLIE RAY POWELL, VAUGHN MICHAEL WILLIAMS, MICHAEL DOYLE NORTON, GARRY

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